90-582

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BENTON, BENTON & BENTON,
A Professional Law Corporation,
Petitioner

versus

LOUISIANA PUBLIC FACILITIES
AUTHORITY, *et al.*
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This Petition for Writ of Certiorari presents the following questions for the Court's consideration:

1. Whether a "private conspiracy" exception to the *Parker v. Brown* state action doctrine excludes from the shield of antitrust immunity conferred by *Parker* Sherman Act violations that result from a conspiracy between certain officials of a public financing authority and a group of private attorneys to use the powers and resources of the authority to advance the anticompetitive commercial goals of the private attorneys?

2. Whether an anticompetitive practice, which is neither explicitly authorized nor a necessary consequence of legislatively authorized activity, but which results instead from a choice to use anticompetitive rather than procompetitive means of purchasing services *incidental* to a legislatively authorized activity, meets the "clear articulation" standard for state action immunity from antitrust laws applicable to subordinate political entities of a state?

3. Whether a public financing authority, created by private individuals, which acts autonomously and is insulated from meaningful control by any governmental body or official, can properly be deemed a "state agency" not subject to the active supervision requirement for state action immunity from the federal antitrust laws?

4. Whether providers of specialized legal services whose only consumers are governmental or quasi-governmental public entities are automatically immune from antitrust liability under the state action and *Noerr-Pennington* doctrines when they attempt or conspire to monopolize the provision of such services, simply because their clients or potential clients are governmental or public entities rather than private parties?

LIST OF PARTIES TO THIS PROCEEDING

The following party, plaintiff and appellant in the proceedings below, is the petitioner in this proceeding for writ of certiorari:

Benton, Benton & Benton, A Professional Law Corporation

The following parties, defendants and appellees in the proceedings below, are respondents in this proceeding for writ of certiorari:

Louisiana Public Facilities Authority
Steve E. Hicks, attorney
Law firm of Foley, Judell, Beck, Bewley, Martin & Hicks
Law firm of McCollister, McCleary, Fazio & Holliday

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES TO THIS PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING WRIT 12

CONCLUSION 29

APPENDICES 1a

TABLE OF AUTHORITIES

Page

Cases

Affiliated Capital Corporation v. City of Houston, 735 F.2d 1555 (5th Cir. 1984) (en banc) 28

Allied Tube & Conduit Corp. v. Indian Head, Inc., __ U.S. __, 108 S.Ct. 1931 (1988) 27

Bolt v. Halifax Hospital Medical Center, et al, 891 F.2d 810 (11th Cir. 1990) 17, 18, 26

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512, 92 S.Ct. 609, 612 (1974) 10

Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032 (2d Cir. 1986) 26

Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 81 S.Ct. 523 (1960) 9, 10, 16, 27, 28, 29

Goldfarb v. Virginia State Bar, 421 U.S. 657; 95 S.Ct. 2004 (1975) 15

Harris v. Trustees of the Louisiana Public Facilities Authority, 356 So.2d 1093 (La.App. 1st Cir. 1977), cert. denied, 357 So.2d 558 (La. 1978) 9, 10

Mansanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752, 764, 104 S.Ct. 1461, 1471 (1984) 21

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986) 20

Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127 (4th Cir. 1989) 14, 15, 17, 19

Parker v. Brown, 317 U.S. 341; 63 S.Ct. 307 (1943) ..... *passim*

Penny v. Parish of East Baton Rouge, 533 So.2d 1237 (La. App. 1st Cir.), writ denied, 532 So.2d 160, appeal dismissed, 532 So.2d 161, reconsideration denied, 532 So.2d 348 9

Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474 (6th Cir. 1990) 26

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 105 S.Ct. 1721 (1985) 10, 24

Superior Court Trial Lawyers Association v. Federal Trade Commission, __ U.S. __, 110 S.Ct. 768 (1990) 27

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S.Ct. 1713, (1985) 11, 17, 23, 24, 25

United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965) 9, 10, 16, 27, 28, 29

Westborough Mall v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982) 19

Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), aff'd. on rehearing, 576 F.2d 696 (5th Cir. 1978) 18

United States Code

15 U.S.C. §§ 1, 2, 15 and 26, commonly known as the Sherman Antitrust Act ..... *passim*

Louisiana Statutes

La. R.S. 9:2341, et seq. (the Public Trust Act) 2, 10

La. R.S. 42:263 6

Miscellaneous

Hurwitz, "Abuse of Governmental Processes, The First Amendment and the Boundaries of Noerr", 74 Georgetown L.J. 65 (1985) 16, 29

Minda, "Interest Groups Political Freedom: A Modern Reassessment of the Noerr-Pennington Doctrine", 41 Hastings L.J. 907 (1990) 16, 29

Note, "The Commercial Exception: A Necessary Limitation to the Noerr-Pennington Doctrine", 63 Indiana L.J. 401 (1987) (authored by M. Gutwein) 16, 28

"The Public Trust Act in Louisiana: A Practical Approach To A Continuing Problem", 20 La. Bar Journal 147 (1972) 3

Wiley, "A Capture Theory of Antitrust Federalism", 99 Harvard L.Rev. 713 (1986) 16

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Benton, Benton & Benton, A Professional Law Corporation, petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed a decision of the United States District Court for the Middle District of Louisiana granting summary judgment dismissal of petitioner's antitrust suit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 897 F.2d 198 and reprinted at Appendix A, p. 1a. The opinion of the United States District Court for the Middle District of Louisiana is reported in full as an appendix to the Fifth Circuit opinion at 897 F.2d 200 and reprinted at Appendix A, p. 3a.

JURISDICTION

The Court of Appeals entered judgment on March 30, 1990, and denied petitioner's application for rehearing and suggestion for rehearing en banc on May 17, 1990. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutory provisions involved in this case are reprinted at Appendix D, p. 14a.

United States Code

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2

Louisiana Revised Statutes

La. R.S. 9:2341, et seq.

STATEMENT OF THE CASE

This case involves an antitrust claim by a law firm, that specializes in serving as "bond counsel" in connection with the issuance of municipal bonds, against a public financing authority authorized by state law to issue "conduit" municipal bonds and an attorney and two law firms who also specialize as "bond counsel".[1] This case arises out of an arrangement between the respondent attorneys and the Louisiana Public Facilities Authority ("LPFA") to permit only these attorneys to serve as bond counsel in connection with LPFA conduit bond issues.[2] The Court of Appeals found the LPFA and the private attorneys immune from antitrust liability under the *Parker v. Brown* state action doctrine.

I.

In 1970, the Louisiana legislature enacted the Public Trust Act, R.S. 9:2341, et seq., authorizing the creation of so-called "public trusts" to serve as "conduits" for the issuance of tax-exempt bonds[3] for the benefit of private commercial borrowers and

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1. "Conduit" municipal bonds are bonds issued by the authority on behalf of another party and payable from revenues provided by the other party for which the authority assumes no financial responsibility. Bond counsel is the attorney or law firm delivering an "independent" opinion on the basis of which bonds are sold in the municipal bond market. Such bond counsel typically opines as to the legality and tax exemption of interest on the bonds.

2. The LPFA, like other issuers of municipal-type bonds, retains its own attorney, in addition to bond counsel, to represent its interest in connection with a bond issue. This case therefore does not involve, as respondents argued in the lower courts, selection by a client of its own attorney, activity not violative of the antitrust laws, and the District Court so held. See Appendix A, p. 7a.

3. Bonds with interest exempt from federal income taxation.

governmental entities. The statute, like similar statutes in other states, was intended to take advantage of the power to issue "tax-free" bonds to finance private projects deemed to be in the public interest.[4] The Public Trust Act authorized private parties to form a "public trust", "with the state or any parish, municipality, political or governmental agency or instrumentality of the state as the beneficiary thereof".[5]

In 1974, the LPFA was created by an "indenture of trust" drafted by one of the respondent lawyers.[6] A former governor of Louisiana accepted "beneficial interest" in the trust on behalf of the state.[7] Under the indenture, the governing board of trustees of the LPFA is a self-nominating, self-perpetuating body subject to nominal "appointment" by Louisiana's governor every six years from a list of nominees submitted by the current trustees.[8]

Despite the acceptance of "beneficial interest" and nominal appointment of trustees by a state official, the LPFA acts autonomously and is insulated from effective control or supervision by any governmental body or official.[9] The indenture

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4. See Note, "The Public Trust Act in Louisiana: A Practical Approach To A Continuing Problem", 20 *La. Bar Journal* 147 (1972), pp. 147-154.

5. In the early 1960's, the IRS explicitly approved affording tax-exempt status to interest on bonds issued by private entities "on behalf of" state or local governments. Under IRS Revenue Rule 63-20, 1963, bonds of any industrial development corporation formed under a state's general non-profit corporation law, when approved by the state or political subdivision, will be considered issued "on behalf of" the state or political subdivision, so that interest on such bonds is excludable from gross income for federal income tax purposes. Also Section 145 of the Internal Revenue Code of 1986 (26 U.S.C. § 145) affords tax-exempt status to interest on bonds issued by private non-profit organizations that qualify for a tax-exemption under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)).

6. Appendix U, p. 88a.

7. Appendix F, p. 35a.

8. Appendix E, pps. 33a-34a.

9. Appendix Y, pps. 95a, 96a.

creating the LPFA expressly separates the LPFA from the state and removes it from state control by providing that:

> "Neither the acceptance of the beneficial interest hereunder [in the LPFA] * * * shall be deemed or construed to be the creation of a Public Trust by said Beneficiary [the state].
>
> * * * * * * *
>
> "[The state] shall have no legal title, claim or rights to the Trust Estate, its income, or any part hereof, or to demand or to require any partition or distribution thereof * * * [or] any authority or right whatsoever, to do or transact any business for, or on behalf of, or binding upon the Trustees or upon the Trust Estate, nor the right to control or benefits of this Trust, * * *"[10]

Other than the issuance of tax-exempt bonds, the LPFA performs no governmental or public functions. It has no regulatory or taxing authority and is supported by fees and charges imposed on the private and governmental beneficiaries of the bond issues for which it serves as conduit issuer.

The LPFA has become over the years since its creation a major participant in the Louisiana market for bond counsel services.[11] It has become the main channel through which a major portion of conduit tax-exempt bonding authority authorized by Congress for the State of Louisiana has had to flow. In fact, the LPFA, according to its chairman, has grown to be the 5th largest issuer of tax-exempt bonds in the United States and has sold (through 1987) over $8.8 billion in bonds.[12]

Since its inception in 1974, the LPFA has exclusively used as bond counsel for all bond issues only respondent Steve Hicks and

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10. Appendix E, pps. 33a-34a, Indenture of Trust, §§ 1.2 and 8.2.

11. See Appendix G, p. 37a, Affidavit of William J. Moore, Ph.D., economist.

12. See Appendix R, p. 77a.

the law firms of which he is or was a member.[13] This is undisputed. The LPFA has refused to allow petitioner and other qualified bond attorneys to serve as bond counsel on any bond issues, despite requests to do so by parties on behalf of whom the LPFA has issued bonds and who traditionally select bond counsel in "conduit" bond issues.

In its original complaint, petitioner claimed that the respondent lawyers — particularly Hicks — have, through special personal relationships with LPFA officials, induced the LPFA on a number of occasions to coerce project sponsors, on behalf of whom the LPFA is issuing bonds, to discharge petitioner and retain respondent attorneys as a condition of the LPFA issuing their bonds.

On several occasions this coercive activity has taken place outside the context of official LPFA governing board action and has involved the LPFA chairman, Victor Bussie, and/or Hicks, taking direct action to coerce the use of a Hicks-related firm as bond counsel. Indeed on one occasion, without governing board action, LPFA chairman Bussie and Hicks summoned hospital representatives to a meeting after the hospital board expressed a desire to use petitioner as bond counsel in connection with a major expansion project and bond issue for the hospital. When the hospital representatives resisted the notion of Hicks acting as bond counsel, Hicks threatened to have some annual fees due the LPFA under a prior bond issue reinstated.[14] At this same meeting, LPFA chairman Bussie, who is also president of the state AFL-CIO, made extraordinary unsolicited references to the hospital's history of labor peace in connection with its construction projects.[15]

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13. Hicks was originally a member of respondent law firm McCollister, McCleary, Fazio & Holliday (the "McCollister firm") and after leaving the McCollister firm and a brief interlude with the partnership of Hicks, Selvidge and McConnell, Hicks and his partners joined respondent firm Foley, Judell, Beck, Bewley, Martin & Hicks (the "Foley firm"). See Appendix G, p. 39a.

14. See Appendix I, p. 44a-45a; Appendix M, p. 54a.

15. See Appendix M, p. 55a.

Since petitioner's complaint was filed in October, 1985, the LPFA has greatly expanded its scope of operations and resulting influence over the market for bond counsel services in Louisiana. The LPFA has established direct relationships through "pooled financings" with almost all municipalities, parishes, school boards and other state and local government bodies in Louisiana. Respondent attorneys have been positioned by the LPFA to handle bond counsel work for all of these local and state governmental subdivisions and agencies with the effect that petitioner and other qualified bond attorneys have been virtually excluded from the "market". Since the filing of this suit petitioner's "market share" of bond counsel work in Louisiana, at one time significant,[16] has been substantially taken over by defendants.

In addition to the exclusion of petitioner and all other qualified bond attorneys by the LPFA, petitioner presented evidence and argued in the district and appellate courts that the following examples of noncompetitive conduct demonstrate that private parties created and, over a period of years, have conspired to retain control over the LPFA for purposes of private profit and economic and political power:

1. The LPFA has been used to issue a number of very large bond issues, including "blind pools"[17], for arbitrage profits, with no public purpose. "Arbitrage" is the profit earned on investing tax-exempt bond proceeds in higher yielding investments. Projects having little or no reasonable expectation of actually being constructed have been the subject of LPFA bond issues with the proceeds being used, not for projects, but to generate arbitrage profits to pay lucrative fees to respondent attorneys and others participating in the transactions.[18] Some of these unused

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16. See Appendix G, p. 36a; Appendix M, p. 58a.

17. Blind pools are bond issues issued without knowing for what projects and on whose behalf the bond proceeds will be used. Until such determination is made, the idle bond proceeds remain invested. If not used on projects, the proceeds are then used to simply redeem the bonds after a period of time.

18. See Appendix R, pps. 74a, 76a-77a; Appendix W, p. 93a.

large bond issues have been "refunded" with a new round of fees, costing taxpayers millions of dollars.[19]

2. The LPFA leases its office space in a building partially owned by respondent Hicks. The building was constructed using $7 million of tax-exempt bonds issued by the LPFA. The rent paid by the LPFA to Hicks and the other owners is among the highest rates paid for office space in the city.[20]

3. Some of respondent attorneys have attempted to sell real estate to developers in connection with LPFA bond issues on behalf of such developers.[21]

4. Respondent attorneys attempted to merge almost all bond attorneys in Louisiana into the two respondent firms and control and divide all LPFA bond business. Petitioner was solicited by one of the respondent firms to merge so that petitioner "could have access to the LPFA."[22]

5. The LPFA develops, advertises and promotes, on a statewide basis, bond "pools" to make loans to local government entities, such as school boards and municipalities. All business obtained by the LPFA is handled by respondent lawyers. The LPFA also solicits information from school boards, districts and municipalities throughout the state as to their future capital improvement needs. This valuable information has been made available to respondent attorneys, but not to petitioner and other bond attorneys.

6. Petitioner's employment to handle bond issue projects, including a nursing home and a hospital, was terminated as a result of threats by LPFA officials to reject the projects unless Hicks and his law firm were substituted as bond counsel. The

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19. Congress has amended federal tax laws to prevent certain of these "abuses" engaged in by the LPFA.

20. See Appendix U, p. 86a.

21. See Appendix W, p. 92a.

22. See Appendix M, pps. 59a-61a.

hospital had to pay a bond counsel fee twice as large as the fee petitioner agreed to charge.[23]

7. The LPFA proceeded with respondent firms to issue a $1.4 billion bond issue to repay an unemployment compensation debt due by the state to the United States, paying more than $1,580,000 in fees to respondent law firms, after rejecting a joint proposal by petitioner and a preeminent nationally known bond law firm to perform the work for $260,000.[24] The LPFA and respondent firms subsequently undertook to refund this bond issue, but the proposed refunding was rejected by the state as serving no purpose other than the generation of bond counsel and other fees.[25]

8. Petitioner's principal, Fred Benton, was threatened, at the behest of LPFA officials and others, to drop the present antitrust action or else the state would not allocate needed tax-exempt bonding capacity to a municipality employing petitioner, but would instead allot such capacity to the LPFA, employing Hicks.[26]

9. Respondent attorneys have made, and have marshaled participants in LPFA bond issues to make, significant political contributions to elected officials in Louisiana, particularly those involved in approving LPFA bond issues.[27]

Aside from the foregoing, petitioner complained that the Foley firm, as a result of aggressive acquisition of other bond firms[28] and other predatory actions[29], as well as Hicks' activi-

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23. See Appendix H, p. 43a; Appendix I, pps. 44a-45a.

24. See Appendix K, pps. 48a-49a.

25. See Appendix X, p. 94a.

26. See Appendix L, p. 50a.

27. See Appendix O, pps. 64a-65a; Appendix V, pps. 90a-91a.

28. See Appendix M, pps. 59a-61a.

29. Respondent Foley firm gave erroneous legal advice to induce a major municipal client of petitioner to dismiss petitioner and retain the Foley firm. The erroneous advice resulted in Louisiana courts invalidating one of the

ties in connection with the LPFA, has monopolized or attempted to monopolize the relevant market for the provision of bond counsel services in Louisiana. In this connection, petitioner submitted an affidavit of a competent economist, based on research of state bond issue records, asserting that the Foley firm "has a monopoly in the Louisiana market for bond counsel services," controlling "well over 55% of the market . . . as of 1985," as a result of its predominance in connection with the bonds issued by industrial development boards (which also issue conduit municipal bonds on the local level) as well as the control over conduit bonding through the LPFA afforded by Hicks.[30]

II.

After limited discovery, the District Court granted respondents' motions for summary judgment and the Court of Appeals affirmed with a short decision adopting and incorporating the opinion of the District Court as an appendix.

The District Court's decision held that the LPFA is a "state agency" for purposes of the Sherman Act and is immune from liability for alleged antitrust violations in the hiring of respondent lawyers as "bond counsel" under the state action doctrine of *Parker v. Brown*, 317 U.S. 341; 63 S.Ct. 307 (1943), and that the respondent lawyers are also shielded from the application of the antitrust laws under the state action doctrine.[31]

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municipality's bond issues at significant cost to petitioner's former client and its taxpayers. *Penny v. Parish of East Baton Rouge*, 533 So.2d 1237 (La.App. 1st Cir. 1988), writ denied 532 So.2d 160, appeal dismissed 532 So.2d 161, reconsideration denied, 533 So.2d 348 (La. 1988); see Appendix N, pps. 62a-63a.

30. See Appendix G, pps. 38a-42a.

31. Although urged by respondents, the Court did not explicitly rely on the *Noerr-Pennington doc*trine, which is typically invoked to shield private parties from antitrust liability when they participate with "state actors" in what otherwise would be a Sherman Act violation. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523 (1960); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512, 92 S.Ct. 609, 612 (1972).

In characterizing the LPFA, the District Court initially stated that the LPFA "clearly is neither the state itself nor a municipality." The Court then observed that the LPFA, as a public trust, and its trustees are subject to certain enumerated state regulatory statutes also applicable to government entities and public officials.[32]

Next, the Court looked to a characterization of the LPFA contained in a Louisiana appellate court decision, *Harris v. Trustees of the Louisiana Public Facilities Authority*, 356 So.2d 1093 (La.App. 1st Cir. 1977), cert. denied, 357 So.2d 558 (La. 1978), which described the LPFA in the following terms:

> "It is clear that a public trust authority created under the Public Trust Act is neither a political subdivision of the State nor a municipal corporation. It is a unique creature of the Legislature designated as a 'public corporation' in R.S. 9:2341. It is a corporation created by the Legislature and empowered to act for public purposes." 356 So.2d at 1041.

Based on the fact that public trusts such as the LPFA are subject to certain state statutes applicable to governmental officials and on the characterization of the LPFA in the *Harris* case, the District Court Judge concluded "that the Authority is a public agency created by the State and that it performs public functions." Having thus characterized the LPFA as a "public agency", the District Court then decided that its anticompetitive practices in the selection of bond counsel were shielded from Sherman Act enforcement by the state action immunity doctrine of *Parker v. Brown*. In reaching this conclusion the District Court reasoned as follows:

The Court relied instead on the principle that private parties who act pursuant to a state's anticompetitive "policy decisions" are also immune from antitrust enforcement under the state action doctrine. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721 (1985).

32. Such as the open meetings law, public bid law, public records law, malfeasance law and "supervision" by the legislative auditor and the State Bond Commission.

> "It is thus clear that the Legislature has authorized this public agency to issue bonds and to take all necessary steps in connection with the issuance. One of the necessary steps in connection with the issuance of bonds is the selection and employment of bond counsel. The Court concludes that the Authority is a state agency and, as such, active state supervision of its activities is not required. *Town of Hallie v. City of Eau Claire*, supra."

Thus, according to the District Court, legislative authority to issue bonds is sufficient to confer authorization to select bond counsel, who performs a necessary function incidental to the issuance of bonds, in an anticompetitive manner.

Having previously rejected respondents' claim that selection of bond counsel on an exclusive basis constitutes a client's choice of lawyer not violative of the antitrust laws, the District Court, assuming that petitioner had shown Sherman Act violations, nevertheless proceeded to dismiss petitioner's suit on immunity grounds:

> "Accordingly, the Court concludes that *assuming the Authority's activities in connection with the selection and employment of lawyers on bond issues amounts to anti-competitive activity within the meaning of the Sherman Act*, those activities are shielded by the state action immunity of *Parker v. Brown*." (emphasis added)

> "This court concludes that these private parties who are contracting with the public agency are also shielded by the state immunity doctrine, *assuming that the practice would amount to a violation of the Sherman Act if engaged in by private parties alone*."[33] (emphasis added)

Neither the District Court nor the Court of Appeals addressed petitioner's Sherman Act § 2 monopolization claims against the respondent attorneys apart from their relationship and activities with the LPFA.

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33. See Appendix A, pps. 9a-10a.

REASONS FOR GRANTING WRIT

The central issue raised by the instant case is whether or not *Parker* immunity can be invoked to shield from the antitrust laws anticompetitive activity undertaken solely for private commercial purposes simply because such activity involves a "public entity" performing a legislatively authorized "public function", without regard to how such entity is characterized on the spectrum of "state actors" and without regard to the nature of the anticompetitive activity, the relationship of public officials and beneficiary private parties and the absence of meaningful governmental control over or public purpose served by the public entity's actions.

The decision of the District Court in the instant case, as affirmed by the Fifth Circuit, is in conflict with a number of decisions in other circuits, as well as language in decisions of this Court which recognize that *Parker* immunity does not extend to violations resulting from a conspiracy between public officials and private parties acting solely to further the anticompetitive commercial purposes of the private parties. The Court's ruling also undermines the distinction drawn over the history of state action analysis between the actions of governmental bodies acting in some sovereign capacity, that warrants application of the principals of federalism expressed by the *Parker* exemption, and the activities of entities such as the LPFA which exhibit some indicia of public or quasi-public status, but which are more subject to private control and abuse for private economic ends than to state governmental control and accountability to the public. Further, this decision completely eviscerates the "clearly articulated and affirmatively expressed state policy" standard which must be met to confer immunity on any governmental entity (other than the state's legislature or supreme court), by finding a "clear articulation" and "affirmative expression" of state policy in favor of the LPFA's anticompetitive purchase of bond counsel services, solely by implication, in the mere legislative authorization granted to public trusts, such as the LPFA, to issue bonds. Finally, the lower courts' decisions, by failing to address at all petitioner's Sherman Act § 2 claims against respondent

attorneys apart from their relationship with the LPFA, wrongly indicate that monopolizing or attempting to monopolize a relevant market is not actionable under the antitrust laws if the customers or potential customers are governmental or public entities rather than private parties.

The principal analytical errors of the courts below are as follows: (1) finding that the LPFA is a "state agency" simply because it performs some "public function", (2) finding "clearly articulated" authorization from the state legislature to employ only respondent attorneys as bond counsel for all LPFA bond issues *by implication* in the LPFA's authority to issue bonds under the Public Trust Act, and (3) granting to both the public and private respondents the state action shield of immunity afforded by *Parker v. Brown*, ipso facto, on such finding, without examining or addressing petitioner's allegations and proof that the LPFA is a party to a private conspiracy prohibited by the Sherman Act, for which petitioner has established a strong prima facie case, and without examining or addressing petitioner's § 2 claims against respondent attorneys apart from and in addition to their relationship with the LPFA.

In the *Parker v. Brown* line of cases, this Court has made clear that the state action doctrine does not automatically put beyond the reach of the antitrust laws the anticompetitive activities of governmental entities and related private parties. Indeed the principles served by the *Parker* doctrine, affording due respect to the sovereignty of the states and promoting federalism, are subverted when governments do not act in the public interest, as contemplated by their proper exercise of sovereign powers, and when private parties collude and conspire with public officials to serve their private ends. These fundamental principles were ignored by the District Court and the Fifth Circuit in this case and this decision, if allowed to stand, will foster the invocation of *Parker* immunity in a whole range of contexts that undercut the principles and policies served by the state action doctrine and will, in fact, invite the kinds of anticompetitive practices that the Sherman Act aimed to curb, by encouraging private actors and public officials to subvert government processes for private

anticompetitive ends. The net effect will be injury not only to the competition policy embodied in the antitrust laws, but also to the effective operation of state and local government in the public interest — which the *Parker* doctrine was crafted to protect.

I.

This Court recently granted a writ of certiorari in the Fourth Circuit case of *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989, cert. granted __ U.S. ___, 110 S.Ct. 3211 (1990) which withheld state action immunity from a municipality whose officials were found to have engaged in a "private conspiracy". The petitioners in *Omni* asked this Court to consider whether under a "co-conspirator exception" to the state action immunity doctrine, a municipality and the private parties who successfully persuaded the municipality to enact favorable zoning ordinances should be subject to antitrust liability.

In asking this Court to reject the application of a "co-conspirator exception" under those circumstances, the *Omni* petitioners suggest that the situation might be different if the relevant public officials had agreed to help the private parties involved in return for illegal bribes or if the city was itself operating in the market and entered into a conspiracy to restrain trade for its own economic benefit. The instant case presents, for the most part, this factual converse of the situation posited in *Omni* and, therefore, should be considered by the Court in concert with *Omni*, so as to facilitate the Court's determination of whether there properly exists a "co-conspirator exception" to the state action doctrine and what are its contours, elements, limits and standards of proof.

Alternatively, because the instant case poses essentially the same question as that posed by the petitioners in *Omni*, that is, whether there exists a "co-conspirator exception" to the state action doctrine, the Court should withhold a decision on petitioner's writ application pending a decision by this Court in *Omni*.

In *Parker v. Brown*, supra, at 317 U.S. 341, 63 S.Ct. 314, this Court said:

> "* * *We have no question of the *state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade.* * * * The state in adopting and enforcing the prorate program *made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly* but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (emphasis added)

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773; 95 S.Ct. 2004 (1975), this Court stated (at page 2015):

> "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. * * * *The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.*" (emphasis added)

This Court has thus recognized that state or local governmental participation in "private anticompetitive activity" does not warrant antitrust immunity under *Parker*.

Legal commentators focusing on antitrust matters have long recognized that manipulating governmental processes to secure advantages over existing or potential market rivals can be an attractive competitive strategy to promote private economic goals, and as a consequence, firms may compete for the favor of government as much as for the trade of customers.[34]

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34. See, for example, Wiley, "A Capture Theory of Antitrust Federalism", 99 Harvard L.Rev. 713 (1986); see, also, Minda, "Interest Groups Political Freedom: A Modern Reassessment of the Noerr-Pennington Doctrine", 41 Hastings L.J. 907 (1990); Hurwitz, "Abuse of Governmental Processes, The First Amendment and the Boundaries of Noerr", 74 Georgetown L.J. 65 (1985); Note, "The Commercial Exception: A Necessary Limitation to the Noerr-Pennington Doctrine", 63 Indiana L.J. 401 (1987) (authored by M. Gutwein).

Predatory conduct to advance commercial goals can take place in the political arena as well as the marketplace. In either case, a predator does not seek to win the field by greater efficiency, better services or lower prices, but instead tries to inhibit others in ways independent of the predator's ability to perform effectively in the market. In carving out an area of antitrust immunity for the legitimate anticompetitive actions of state and local governmental bodies, it is important to recognize that a predator's conduct can be far more potent and its impact more permanent when bolstered by the powers of government, and such conduct should not be automatically immunized.[35]

If left unchecked, predation by businesses through the abuse of governmental processes will not only undermine the foundations of the antitrust laws, but will also adversely affect the integrity and quality of the deliberative and decision-making processes of government, one of the goals sought to be fostered by the *Parker* state action doctrine.[36]

Recognizing the corrosive effects on the values sought to be promoted by the state action doctrine, a number of appellate courts have specifically identified and applied a "private conspiracy" exception to the state action doctrine, which excludes from the shield of antitrust immunity Sherman Act violations that result from conspiracy between public officials and private parties acting solely to further the anticompetitive commercial purposes of the private parties.

As previously noted, the Fourth Circuit in *Omni* withheld *Parker* immunity from a municipality whose officials were found to have engaged in a private conspiracy. In *Omni*, the Fourth Circuit found a conspiracy, such as is alleged by petitioner herein:

> "We conclude, therefore, that sufficient evidence supports the jury's finding that there was a conspiracy between the City and COA in violation of sections 1 and 2 of the Sherman Act, and therefore that the City was deprived

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35. See Hurwitz, supra, p. 69

36. See Minda, supra, p. 1028; Hurwitz, supra, p. 69.

> of the *Parker* immunity to which it would have been entitled except for its involvement in the conspiracy." 891 F.2d at 1137

The Fourth Circuit concluded that Columbia, South Carolina was authorized by the state to engage in anticompetitive conduct. However, the Court went on to hold that this conclusion did not end the judicial inquiry as to the applicability *vel non* of the *Parker* doctrine:

> "* * *We agree with Omni's contention that the *Parker* exemption is unavailable here. Implicit in the jury verdict was a finding that the City was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry."

In a very important case recently decided by the Eleventh Circuit, *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810 (11th Cir. 1990), cert. denied, __ U.S. __, 1105 S.Ct., 1960 (1990), the Court reached the same conclusion. In *Bolt*, the Eleventh Circuit found a conspiracy that prevented the defendant hospital from being exempt from the antitrust laws. The hospital was a "public agency" similar to the LPFA:

> "This court has held that even when state policy displaces unrestrained competition, a municipality-like entity that enters into an unauthorized conspiracy to restrain competition may not claim the protection of *Town of Hallie* [*Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 83 L.Ed.2d 25 (1985)]. (other citations omitted) Clearly Dr. Bolt has alleged that HHMC entered into an unauthorized and unforeseeable conspiracy, and if he is able to prove his allegations, then HHMC's *ultra vires* conduct will not be exempt from antitrust scrutiny."[37]

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37. 891 F.2d at 825

It should also be noted that, unlike the Fifth Circuit in the instant case, which terminated its inquiry upon a finding that the LPFA is a "state agency", the *Bolt* Court held that even if the hospital was a state agency, and it was not, this would not, ipso facto, result in *Parker* immunity:

> "Even if HHMC is a state agency, *Parker* appears to be inapplicable to this case. The Supreme Court expressly noted that, in the case before it, the state agency 'made no contract or agreement and entered into no conspiracy.' 317 U.S. at 352, 63 S.Ct. at 314. Thus, the Court addressed only those situations in which the state agency acted unilaterally, as sovereign, in *imposing* the restraint. * * * Dr. Bolt, in the present case, does not allege that HHMC acted pursuant to state requirements, but rather, that it acted in concert with other private individuals. Such conduct on the part of a state agency would remove it from the protection of *Parker*."[38]

Similarly, even the Fifth Circuit itself in an earlier case, *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), aff'd. on rehearing, 576 F2d 696 (5th Cir. 1978), recognized that *Parker* immunity was unavailable to municipalities that acted solely to further the anticompetitive commercial purposes of private parties:

> "The *Parker* doctrine is not to be applied automatically. A thoughtful analysis is called for to ensure that it is a *bona fide* governmental decision for which exemption is being sought.
>
> * * *
>
> "Such action must be state action, not individual action masquerading as state action."[39]

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38. 891 F.2d at 823.

39. 559 F.2d, at 378; see also *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982).

Implicit in all of these decisions is the notion that competition generally serves the public good and, barring some overriding public purpose to the contrary, will ordinarily be selected and promoted by government decisions made independently, in good faith and in the public interest. The acknowledgment and recognition of a "private conspiracy" exception to the *Parker* state action immunity doctrine permits the antitrust laws to work in a manner properly sensitive to the legitimate governmental processes of state and local government, while at the same time preventing immunity doctrine from being misused to protect private anticompetitive activity when government is being used as a mere shield for a private conspiracy in restraint of trade. Private parties seeking to accomplish predatory market objectives through subversion of a government process engage in a form of non-price competitive conduct that potentially represents the most serious form of market predation, the net effect of which is to disservice the public in the political arena as well as the marketplace.

The petitioners to this Court in *Omni* have urged the rejection of a "conspiracy exception" to the *Parker* doctrine, at least to the extent that evaluation of claims of conspiracy require courts to probe the subjective motivations of government officials in making decisions that have an anticompetitive effect. Rejection of a conspiracy exception to the *Parker* doctrine, however, is not necessary to avoid embroiling courts in boundless inquiries into the subjective intent of public officials.

In contrast to the situation posited by the petitioners in *Omni*, the instant case presents, without requiring inquiry into of public officials' subjective intent, a paradigmatic context in which to evaluate an antitrust plaintiff's claim that state action immunity does not shield conspiracy or collusion between public officials and private parties engaging in anticompetitive activity.

There are certain factors, which do not require probing public officials' subjective motivation, that could be considered in evaluating an antitrust plaintiff's complaint of conspiracy involving such officials. First of all, like proof of antitrust conspiracy under § 1 among private actors, a plaintiff alleging conspiracy involving

a public official should be required to show how such conspiracy inures to the benefit of the public official, as well as the private parties involved.[40] In the instant case, for example, petitioner can show that the LPFA officials, as well as respondent attorneys, benefitted from their relationship. Of the $8.8 billion in bonds issued by the LPFA through the year 1987, approximately $1.3 billion of such bonds were issued and the proceeds used for no purpose whatsoever, other than the generation of fees — fees not only for the bond attorneys, but fees for the LPFA, which extracts a fee from every bond issue it undertakes. Many of these questionable bond issues would have been avoided had the LPFA availed itself the benefit of independent bond counsel chosen on a project-by-project basis and received the benefit of advice from independent counsel. Instead, a close-knit group of bond attorneys and the LPFA worked together, first of all, to make fees — and secondly, if possible — to use bond proceeds for the legitimate purposes that Congress intended. As previously noted, despite Louisiana's relatively small size and population, the LPFA, at one point, grew to be the fifth largest issuer of bonds in the United States. As a result, the LPFA has an unencumbered surplus of $13 to $15 million, which has been utilized, at least in part, to support extravagant expenditures by the trustees and employees of the LPFA.[41]

Second, an antitrust plaintiff alleging conspiracy involving public officials could be required to show that the anticompetitive actions of public officials do not "make sense", in the sense of the public interest, or serve an identifiable public purpose which would indicate independent, rather than collusive, action consistent with rational public interest objectives.[42] Again, in the instant case, petitioner can show that numerous actions of the

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40. See *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986).

41. See Appendix P, pps. 68a-70a; Appendix S, pps. 78a-82a; Appendix T, pps. 83a-85a.

42. See *Mansanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1471 (1984).

LPFA do not make sense in the public interest and, therefore, most likely did not occur as a result of independent decision-making on the part of the LPFA, apart from its conspiracy with respondent attorneys. Numerous actions demonstrate the absence of independent decision-making by the LPFA, for example, decisions to pay unnecessarily high fees to bond attorneys and others, decisions to share valuable information with respondent attorneys, and not others, and to solicit business on behalf of respondent attorneys, and not others, and the decision to rent lavish office space from one of the respondent attorneys at a rate far in excess of that typically paid by a "public entity" acting to serve the public interest and conserve the public fisc.

Additional factors that could be considered in evaluating claims of conspiracy involving public officials include the nature of the anticompetitive activity involved, for example, in the instant case, the purchase of a service which can be readily purchased from any number of providers and is not in the nature of a natural monopoly or appropriate activity for grant of an exclusive franchise.

Another factor that could be considered is the relationship of the public officials and the beneficiary private parties. A relationship beyond the arms-length relationship of a public official and an individual or firm interested in doing business with such official's agency, considered in light of other indicia of collusive action, gives credence to claims of conspiracy. In the instant case, the relationship between respondent Hicks and the LPFA chairman is clearly such a relationship. LPFA chairman Bussie's involvement with respondent Hicks' political action committee and their activities together, outside the context of official governing board meetings, to coerce bond issue beneficiaries to use Hicks-related firms as bond counsel are examples of such absence of arms-length relationship and strongly support allegations of conspiracy.

And finally, though not dispositive, it is perhaps appropriate to look at the proximity of the public official charged with conspiracy to the electoral or appointive process, means through which any actions not in the public interest can be redressed.

Typically, though not always, elected officials are more sensitive to acting in the "public interest", rather than for private gain, and in any event, their actions can be more readily challenged in the political arena. In the instant case, the governing board of trustees of the LPFA is virtually insulated from political accountability and indeed numerous public officials have expressed frustration in being unable to curb their abuses.[43]

In summary, recognizing a conspiracy exception to the *Parker* state action doctrine is necessary to prevent and to redress predatory forms of activity that seek to use governmental processes to erect illegitimate barriers to competition. Political activity designed to extort governmental decision-making in favor of one commercial group over another should justify antitrust regulation, if it is established that such activity presents the danger of fostering trade restraints by rendering the political process vulnerable to capture by a particular commercial interest. Private parties seeking to accomplish predatory market objectives through subversion of a government process engage in a form of non-price, anticompetitive action that potentially presents the most serious form of market predation. The state action doctrine should not be used to shield activity that uses government as an instrumentality for furthering a conspirator's plan to restrict trade.

If left unchecked, predation by businesses through the abuse of governmental processes will not only undermine the foundations of the antitrust laws, but will also adversely affect the autonomy and integrity of the deliberative and decision-making processes of government — which the *Parker* doctrine aims to protect.

II.

There is a second issue posed by this case which presents a pressing need for further guidance from this Court. What degree of legislative specificity is necessary to meet the "clear articulation" standard required to extend state action immunity to the

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43. See Appendix Q, p. 72a; Appendix R, p. 76a; Appendix S, p. 81a; Appendix Y, pps. 95a-96a.

subordinate political entities of a state without, on the one hand, burdening too restrictively legislative expression of a policy to displace competition, and without, on the other hand, rendering the standard a meaningless talisman for legitimizing and immunizing from antitrust scrutiny, simply because it involves a public entity, the broadest array of anticompetitive activity that would otherwise be outlawed by the Sherman Act?

The District Court in the instant case apparently concluded, and the Fifth Circuit apparently concurred, that the LPFA's authorization by the Public Trust Act to issue bonds was sufficient "articulation" to confer authorization on the LPFA to select bond counsel in an anticompetitive manner. The District Court reasoned that bond counsel is necessary for the issuance of bonds and therefore legislative authority to issue bonds constitutes legislative authority to engage bond counsel on an exclusive basis or, in the Court's words, "placed no restriction upon the Authority in that connection, except that the attorney general must approve the fee."[44]

This Court in *Town of Hallie v. City of Eau Claire*, supra, held that the "clear articulation" standard is met when the anticompetitive effect is a foreseeable or logical result of engaging in an activity authorized by a state's legislature. However, in *Community Communications Co. v. Boulder*, 455 U.S. 40, 102 S.Ct. 835 (1982), this Court found that the "clear articulation" standard is not satisfied by a general grant of power with no specific reference to the activity in question.

In *Boulder*, this Court held that the State of Colorado, by a general grant of power, had simply not articulated any policy at all regarding cable television regulation and therefore anticompetitive activity in this area did not meet the "clear articulation" standard. In *Hallie*, this Court held that statutory provisions authorizing a city to provide sewerage service, to determine what areas to serve and to hinge service on annexation clearly contemplated anticompetitive conduct in tying the provision of sewage

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44. See Appendix A, p. 10a.

treatment to the provision of sewage collection and transportation and to annexation by the city, and therefore, met the "clear articulation" test for immunity.

The statute in question in the instant case falls somewhere between *Boulder* and *Hallie* and squarely poses the question of where to draw the threshold line for meeting the "clear articulation" standard so as to trigger state action immunity. Louisiana's Public Trust Act, like *Hallie* and unlike *Boulder*, does at least mention the topic of issuing bonds. However, like the statute in *Boulder* and unlike the statute in *Hallie*, which contained the specific authorization to determine what areas to serve or not and therefore "clearly contemplated" anticompetitive conduct, the Public Trust Act does not mention bond counsel or the manner of selection of bond counsel. It is silent on the subject. The statute's authorization of the issuance of bonds does not "clearly contemplate" anticompetitive conduct and the statute does not establish a regulatory scheme that is "inherently anticompetitive."[45]

In fact, there is no conflict between the Public Trust Act and the Sherman Act. The LPFA can float bonds and protect its legitimate interest in having qualified bond counsel involved without suppressing competition.[46] Conversely neither the statute nor the LPFA's public purpose is served or advanced by forcing beneficiaries of bond issues to terminate competent counsel and retain and pay substantially higher fees to respondent attorneys. In short, legislative policy is neutral and the LPFA has a choice, unfettered by any legislative attention to the matter at all, of selecting bond counsel in a competitive or anticompetitive manner. Is the mere fact that engagement of bond counsel is a necessary incident of issuing bonds, a legislatively authorized activity, sufficient in and of itself to constitute, by implication,

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45. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, supra.

46. Competitive selection of bond counsel, though not embodied in specific state legislation, is the articulated policy and practice of the executive branch of state government. See Appendix Z, pps. 97a-99a.

"clearly articulated" authorization for the anticompetitive engagement of bond counsel by the LPFA?

Such an approach, both literally and logically, reduces the "clearly *articulated* and affirmatively *expressed*" formula to an oxymoron and renders it meaningless as a standard — articulation *by implication, implicit* expression. Its danger is that it expands the state action doctrine to a point of immunizing from antitrust control all anticompetitive choices made by the subordinate political entities of a state, so long as they affect activity which, though unaddressed by state legislation, can be found to be incidental to a legislatively authorized activity. This is immunity without any practical limits and undermines any meaningful application of the Sherman Act to any anticompetitive activity involving public entities.

III.

The importance of characterization as a "public agency" rather than a "private party" for purposes of antitrust analysis is twofold. First, it automatically triggers immunity consideration, and second, it probably absolves the immunity-claiming entity from the "active state supervision" requirement necessary to confer state action immunity on private parties.[47] Characterization of a governmental body as the state, a state agency, a municipality or a private party is ordinarily not problematic. However, in cases involving entities like the LPFA, which exhibit some indicia of governmental or quasi-governmental status, but which do not fit neatly into the traditional categories and cannot demonstrate active state supervision, classification as a state agency (or a municipality-like entity) is critically necessary to shield such entity's anticompetitive activity from antitrust challenge.

A number of appellate courts have grappled with the issue, but no useful test has emerged for effectively categorizing an

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47. See *Town of Hallie v. City of Eau Claire*, supra.

entity, for purposes of antitrust analysis, as public or private.[48] As a consequence, the Sixth Circuit has determined that the Ottawa Community Improvement Corporation ("CIC"), a "community development corporation" which serves essentially the same function as the LPFA, issuance of conduit municipal bonds, is a private entity and not entitled to state action immunity. The Fifth Circuit, on the other hand, has found the LPFA to be a "public entity" because it serves a "public function" — the issuance of conduit municipal bonds.

Guidance from this Court is needed, not only to delineate a useful test for distinguishing public from private entities for purposes of antitrust immunity analysis and resolving conflict and confusion among the circuits, but more importantly it is needed to address the question of whether, in borderline or hybrid cases such as the LPFA and the CIC, a more functional analysis, which focuses on the degree of public control there is over such entity through state political or governmental processes, would be more fruitful than distinctions between public and private in evaluating whether an entity's anticompetitive activities reflect the expression of a state's sovereign will, the bedrock principle on which *Parker* state action immunity is founded.

In *Riverview Investments*, the Sixth Circuit based its denial of state action immunity to CIC on the lack of accountability of the entity, its independence from government, "making independent decisions without the input, advice, involvement or oversight of . . .any governmental body." In the instant case the LPFA's lack of accountability and independence from the political process and from meaningful oversight by any governmental body was not dispositive or even significant for determining its entitlement to state action immunity. Immunity flowed from serving a public function, the issuance of bonds.

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48. See *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990); *Bolt v. Halifax Hospital Medical Center*, supra; see also *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032 (2d Cir. 1986).

As suggested above, without accountability to the political process and meaningful oversight, such insulated public entities are more readily subject to capture and/or subversion to serve predatory commercial ends rather than the state's sovereign will or the public interest. An entity, such as the LPFA, created by private individuals, which acts autonomously and is insulated from any meaningful control or supervision by any governmental body or official, should not be automatically afforded state action immunity in everything it undertakes, simply because it performs some public function or somehow is denominated a "public agency".

IV.

Neither the District Court nor the Fifth Circuit addressed petitioner's Sherman Act § 2 claims against the respondent attorneys for conspiring and attempting to monopolize the provision of bond counsel services in the relevant market in Louisiana. The courts' silence reflects, perhaps, the assumption that, since bond attorneys basically sell their services to governmental bodies or "public entities" like the LPFA, their attempts, conspiracies and even their successful efforts are immunized under the state action doctrine because they are dealing with governmental bodies, or alternatively, because of their actions constitute petitioning or concerted action to petition government, protected from antitrust liability under the *Noerr-Pennington* doctrine.[49]

The question of whether providers of services whose consumers are governmental or quasi-governmental public entities are, because of this fact, immune from antitrust liability under the state action and/or *Noerr-Pennington* doctrines when they attempt, conspire or monopolize the provision of such services

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49. This Court in two recent cases, has explicitly recognized that the *Noerr-Pennington* doctrine does not extend to "every concerted effort that is genuinely intended to influence governmental action". *Superior Court Trial Lawyers Association v. Federal Trade Commission*, __ U.S. __, 110 S.Ct. 768 (1990); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, __ U.S. __, 108 S.Ct. 1931 (1988).

has yielded conflicting responses among the circuits. Typically characterizing their treatment as the "commercial exception" to the *Noerr-Pennington* doctrine, a number of appellate courts have attempted to address the question of whether private parties benefitting from "commercial" interaction with governmental bodies, as contrasted with being the beneficiaries of governmental policy decisions, should be granted immunity for the anticompetitive benefits they receive as the result of their "commercial" relationship with such governmental bodies. A number of circuits have accepted the validity of a "commercial exception". See, for example, *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 424 F.2d 25 (1st Cir. 1970), cert. denied 400 U.S. 850 (1970).[50] Other circuits, most notably the Fifth Circuit, have rejected the "commercial exception" and have instead denominated and recognized a "conspiracy" exception to the *Noerr-Pennington* doctrine when private interests benefit in an anticompetitive manner from commercial relationships with governmental bodies. See *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984).[51]

However denominated, the appellate courts and antitrust commentators continue to struggle with the application of the antitrust immunity doctrine to what appear to be straightforward predatory commercial activities, except for the fact that one party is a governmental entity.[52]

The instant case provides this Court a clear opportunity to determine whether the purchase of services, such as that of bond

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50. See Note, "The Commercial Exception: A Necessary Limitation to the Noerr-Pennington doctrine", supra.

51. The Fifth Circuit in *Affiliated Capital Corporation* also found the unwarranted commercial favoritism granted private commercial interests by the City of Houston to come within the "sham" exception to the *Noerr-Pennington* doctrine.

52. See Minda, supra; Hurwitz, supra; P. Areeda & D. Turner, Antitrust Law, ¶ 206 (Supp. 1982).

counsel services incidental to the issuance of municipal bonds, a commercial transaction that almost always involves government or quasi-government entities as purchaser, because of that fact alone, immunizes all Sherman Act § 2 violations of those providers who conspire or attempt to monopolize the provision of such services.

CONCLUSION

The complaint was filed in this case on October 16, 1985, almost five years ago. Since that time the respondents have engaged in conduct that has greatly expanded the scope, size and pernicious effects of their Sherman Act violations. The petitioner has had prepared for some time an amended complaint and has gathered significant additional evidence not yet in the record.[53]

Reforms are needed in the municipal bond industry nationwide. While exorbitant fees and Louisiana politics are not violative of the Sherman Act *per se*, it is unlikely that reform will occur, except through private enforcement such as the present case. Abuses by the LPFA under the federal tax laws and the Sherman Act require action. Petitioner has been seriously economically damaged, the lives of its employees and their families seriously adversely affected, and its ability and the ability of all other qualified bond counsel to practice in Louisiana have been practically destroyed by the practices of the LPFA and the respondent attorneys in this suit.

That, however, is not the limit of the injury caused by the actions challenged. While there has been injury to the petitioner, there has also been injury to price, quality and competition among bond attorneys. Further and most important, there has been injury to and corruption of governmental processes them-

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53. As can be seen from the Appendices, which allude to important recent evidence not in the record, the District Court grant of summary judgment in this case, concurred in by the Fifth Circuit, deprived petitioner of its day in court, to which it is entitled, to present its evidence that the LPFA and the respondent attorneys have conspired to engage and have engaged in violations of the antitrust laws and are not entitled to claim the immunities, *Parker* and *Noerr-Pennington*, which attach to public officials and private parties acting in good faith to influence, fashion and implement governmental policies.

selves, with the accompanying disservice to the public in the political arena as well as the marketplace. In refusing to intervene merely because anticompetitive activity is seen as taking place in the "political" arena, the courts below have sharply limited the ability of the Sherman Act to protect the process of competition from perhaps the most dangerous form of market predation — predation through abuse of governmental and political processes.

For the foregoing reasons, petitioner's application for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

TABLE OF CONTENTS
TO APPENDICES

Page

APPENDIX A

Opinion of United States Fifth Circuit Court of Appeals (Including Opinion of United States District Court for the Middle District of Louisiana) 1a

APPENDIX B

Notice of Judgment of the United States District Court for the Middle District of Louisiana (November 8, 1988) 12a

APPENDIX C

Notice of Denial of Petition for Rehearing and Suggestion for Rehearing En Banc (May 17, 1990) ... 13a

APPENDIX D

Federal and State Statutory Provisions
Sherman Act 14a
Louisiana Public Trust Act
R.S. 9:2341 *et seq.* 15a

APPENDIX E

Excerpt from Indenture of Trust creating the LPFA, dated August 21, 1974, §§ 1.2, 6.3, 6.4 and 8.2. ..... 33a

APPENDIX F

Executive Order No. 71, issued by Governor Edwin Edwards on August 21, 1974 ..... 35a

APPENDIX G

Affidavit of William J. Moore, Ph. D., economist 36a

TABLE OF CONTENTS
TO APPENDICES

Page

APPENDIX H

"The Retirement Center", Fred G. Benton, Jr. Affidavit of March 10, 1988, page 5 ..... 43a

APPENDIX I

"Our Lady of the Lake Regional Medical Center Project", Fred G. Benton, Jr. Affidavit of March 10, 1988, page 6 ..... 44a

APPENDIX J

"Sewer Privatization", Fred G. Benton, Jr. Affidavit of March 10, 1988, page 7 ..... 46a

APPENDIX K

"$1.3 Billion Unemployment Compensation Bond Issue", Fred G. Benton, Jr. Affidavit of March 10, 1988, page 8 ..... 48a

APPENDIX L

"Dismissal of this Suit as a Condition for CAP Carry Forward", Fred G. Benton, Jr. Affidavit of March 10, 1988, page 10 ..... 50a

APPENDIX M, Part 1

Excerpt from Fred G. Benton Deposition, February 26, 1986, pps. 113-126 ..... 51a

APPENDIX M, Part 2

Excerpt from Fred G. Benton Deposition, February 26, 1986, pps. 183-190 ..... 58a

TABLE OF CONTENTS
TO APPENDICES

Page

APPENDIX N

Portion of Hearing, July 27, 1990, Fred G. Benton, Jr. et al versus Parish of East Baton Rouge 62a

APPENDIX O, Part 1

"Bond industry gives $350,000 to campaigns", *State Times*, Thursday, October 8, 1987, page 1A 64a

APPENDIX O, Part 2

"Bond industry contributes - At least $437,000 pumped into 1987 election campaigns", *Morning Advocate*, Saturday, November 7, 1987, page 7A 66a

APPENDIX P, Part 1

"LPFA has $10.5 million nest egg built from fees it collected", *State Times*, Thursday, November 5, 1987, page 6A 68a

APPENDIX P, Part 2

"Agency's high spending for outside consultants questioned". (LPFA has $15.1 in assets), *State Times*, Thursday, December 14, 1989, page 1A 70a

APPENDIX Q, Part 1

"LPFA source of income for select few - New Orleans law firm makes $11.8 million handling 204 bond issues for authority", *Morning Advocate*, Thursday, November 5, 1987, page 11A 71a

TABLE OF CONTENTS
TO APPENDICES

Page

APPENDIX Q, Part 2

"Select few make millions on sales - Handling LPFA bond issues profitable for N.O. law firm", *State Times*, Wednesday, November 4, 1987, page 1A 72a

APPENDIX R, Part 1

"$74 million in LPFA bonds built only big fees - Money banked, no projects constructed", *Sunday Advocate*, February 25, 1990, page 1A 74a

APPENDIX R, Part 2

"LPFA bond issues helped worsen rental market", *Sunday Advocate*, February 25, 1990, page 1A 75a

APPENDIX R, Part 3

"Agency borrows $1.3 Billion that remains unused - Attorneys, consultants make $26.2 million from bond sales", *State Times*, Tuesday, November 3, 1987, page 1B 76a

APPENDIX R, Part 4

"Agency's financing 'pools' often go unused - Attorneys, consultants paid $26.2 million in fees", *Morning Advocate*, Wednesday, November 4, 1987, page 7A 77a

APPENDIX S, Part 1

"Monsour's firm grosses nearly $1 million in just over a year for LPFA work", *Morning Advocate*, Thursday, November 5, 1987, page 11A 78a

TABLE OF CONTENTS
TO APPENDICES

Page

APPENDIX S, Part 2

"Former Screen aide makes nearly $1 million handling bonds", *State Times*, Wednesday, November 4, 1987, page 12A 79a

APPENDIX S, Part 3

"Agency's high spending for outside consultants questioned". ($15.1 million assets), *State Times*, December 14, 1989, page 1A 81a

APPENDIX T, Part 1

"Offices of LPFA plush, expense accounts liberal - Thousands spent each year on travel and entertainment", *State Times*, Thursday, November 5, 1987, page 1A 83a

APPENDIX T, Part 2

"LPFA officials spend thousands on 'perks'", *Morning Advocate*, Friday, November 6, 1987, page 1B 85a

APPENDIX U, Part 1

"LPFA's Four United Plaza--the building that bonds built", *State Times*, Thursday, November 5, 1987, page 6A 86a

APPENDIX U, Part 2

"Premier bond counsel to LPFA regarded as 'hardball player'", *State Times*, Wednesday, November 4, 1987, page 12A 88a

TABLE OF CONTENTS
TO APPENDICES

Page

APPENDIX V

"Drexel's junk-bond web touches Louisiana", *Sunday Advocate*, Sunday, June 24, 1990, page 1A 90a

APPENDIX W, Part 1

"Local lawyers stood to gain fees, sell property", *Morning Advocate*, Monday, February 26, 1990, page 1A 92a

APPENDIX W, Part 2

"Money banked no projects constructed", *Sunday Advocate*, February 25, 1990, page 14A 93a

APPENDIX X

"State bond refinancing plan killed - Alternative cited for bigger savings", *State Times*, Tuesday, October 31, 1989 . . . . . 94a

APPENDIX Y, Part 1

"Landrieu says state should oversee LPFA", *Morning Advocate*, Tuesday, December 5, 1989, page 16A 95a

APPENDIX Y, Part 2

"Agency's high spending for outside consultants questioned", *State Times*, Thursday, December 14, 1989, page 1A 96a

APPENDIX Z, Part 1

State of Louisiana's "Request for Proposal for Bond Counsel Services" 97a

TABLE OF CONTENTS
TO APPENDICES

Page

APPENDIX Z, Part 2

Governor's Statement to Bond Commission 99a

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-3885

BENTON, BENTON & BENTON,
A Professional Law Corporation,
Plaintiff-Appellant,

V.

The LOUISIANA PUBLIC FACILITIES AUTHORITY, A Louisiana Public Trust and Public Corporation, et al.,
Defendants-Appellees.

March 30, 1990

Appeal from the United States District Court
for the Middle District of Louisiana

Before JOHNSON, WILLIAMS and GARWOOD, Circuit Judges.

PIERRE S. WILLIAMS, Circuit Judge:

Appellant Benton, Benton & Benton, a Baton Rouge law firm, sued the Louisiana Public Facilities Authority (LPFA), two Baton Rouge law firms, and Steve Hicks, a Baton Rouge lawyer, for violations of the Sherman Act. Benton complained that the LPFA engaged in antitrust violations in its hiring of bond counsel. The district court granted the defendants' motion for summary judgment. We affirm.

Appellees assert and the district court held that the LPFA is a state agency. Benton argues that the LPFA is not a state agency under either the Louisiana Constitution or Louisiana state law. After careful review of the record, we find that the district court properly and thoroughly analyzed this issue. Hence, we find no error in the district court's reasoning that the LPFA, at least for these

purposes, is a state agency and enjoys immunity as a public agency from the allegations Benton charges. Additionally, we conclude that the district court was correct in determining that private parties acting pursuant to the state's policy decisions are also shielded from this complaint. Because we conclude the district court properly decided these issues, we affirm the decision of the district court based upon its opinion. It is attached as an appendix.

Appellant places heavy reliance upon a particular Louisiana decision for its claim that the LPFA is not a governmental agency. The case is *Harris v. Trustees of Louisiana Public Facilities Authority*, 358 So.2d 958 (La.Ct.App. 1977) (opinion on motion to dismiss appeal, hereinafter "*Harris I*"). A later associated case is *Harris v. Trustees of Louisiana Public Facilities Authority*, 356 So.2d 1039 (La.Ct.App. 1977), cert. denied, 357 So.2d 558 (La. 1978) (opinion on merits, hereinafter "*Harris II*"). Benton relies upon a statement by the court in *Harris I* that the LPFA is "not" a "governmental unit." *Harris I*, 358 So.2d at 959. The district court and appellees rely in response upon a portion of *Harris II* that explains that the LPFA is "a corporation created by the Legislature and empowered to act for public purposes." *Harris II*, 356 So.2d at 1041. Because of the statement in *Harris I* upon which appellant relies, we find it important to make a brief additional comment on the two cases.

Harris I dealt with a specific issue as to whether the summary procedures of the Bond Validation Act, La.R.S. 13:5121, et seq. (West Supp. 1990), applied to the LPFA so as to make its appeal untimely. In its decision, the court determined only that the LPFA was not a "governmental unit" as defined in the Bond Validation Act. See *Harris I*, 358 So.2d at 959-60, 959 n. 1. In *Harris II*, in contrast, the Louisiana court offered a more complete portrayal of the LPFA's identity. It quoted the Louisiana district court, which had explained:

> It is clear that a public trust authority created under the Public Trust Act is neither a political subdivision of the State nor a municipal corporation. It is a unique creature of the Legislature designated as a 'public corporation' in R.S. 9:2341. It is a corporation created by the Legislature and empowered to act for public purposes.

Harris II, 356 So.2d at 1041-42. The district court's reliance on this portion of *Harris II* was proper. Accordingly, we see no error in

its determination that the LPFA is a public agency fulfilling a public function for purposes of evaluating coverage under the Sherman Act. We see no conflict between such an interpretation and the decision in *Harris I*.

AFFIRMED.

APPENDIX

United States District Court, Middle District of Louisiana.

Benton, Benton & Benton
v.
The Louisiana Public Facilities Authority, et al.
Civil Action No. 85-969-A.

RULING ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the court upon a motion for summary judgment filed on behalf of each of the four defendants. There has been oral argument and extensive briefing by all parties.

This action is brought by a Baton Rouge law firm against the Louisiana Public Facilities Authority; Steve E. Hicks, a Baton Rouge lawyer; and two law firms, the Foley firm and the McCollister firm. The complaint alleges violations of the Sherman Act--that the defendants have conspired to monopolize and have monopolized the business of providing bond counsel services on Authority bond issues.

The Authority is a trust created by a 1974 trust agreement under the provisions of LSA-R.S. 9:2341, et seq. Under §2341 D, all such trusts are "public corporations" of the beneficiary, which in this case is the state of Louisiana.

This law suit is generated, in large measure, because of the provisions of the Internal Revenue Code, 26 U.S.C. §141 et seq., which provide for exemption from federal income taxation of interest received on "municipal bonds." Many years ago, the Congress, in its wisdom, decided that bonds issued by state and local governments for public purposes ought to be made exempt from income taxation in order to improve the competitive standing of such bonds with

corporate and other bonds and to lower the cost of public improvements. Some folks refer to this as a "loop hole" in the tax laws. Others call it sound public policy.

In any event, if by that tax exemption the Congress intended to increase the issuance of municipal bonds, it succeeded beyond anyone's wildest imagination. A practice of issuing "conduit" bonds arose by which a local governmental unit would issue in its name bonds to finance private projects in which it had no interest and for which it assumed no actual repayment obligation. The private party assumed all responsibility for payment of the bonds. The early "conduit" bonds were generally industrial development bonds used to finance local projects which the governing body assumed would benefit the community by providing jobs or other benefits. Since the interest on the bonds was tax exempt, they generally bore a lower rate of interest than corporate bonds which would otherwise have been issued. With typical American ingenuity, by the late 1970's tax free "municipal" bonds were being used to finance such "public" improvements as retail stores, fast-food outlets, commercial establishments, shopping centers and apartment complexes, as well as hospitals, schools, pollution control equipment and transportation facilities.[1]

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1. The Louisiana law authorizes such public trusts to issue bonds for "any authorized public function or purpose of the state" or any local governing body. Under Section 2341 B "authorized public functions or purposes" is defined relatively broadly as:... hospital, medical, health, nursery care, nursing care, clinical, ambulance, laboratory and related services and facilities; housing, mortgage finance and related services, activities, facilities, and properties; penitentiary, rehabilitation, incarceration and other correctional services and facilities; educational services and facilities and related housing and dormitory services and facilities; providing, developing, securing and improving water storage, treatment, supply and distribution services and facilities; sanitary and storm sewer and other liquid and solid waste collection, disposal, treatment and drainage services and facilities; educational or commercial communication equipment and facilities; mass transit, commuting and transportation and parking services, equipment and facilities; cultural and civil facilities, services and activities; community development and redevelopment facilities and activities; gas, electric, petroleum, coal and other energy collection, recovery, generation, storage, transportation and distribution facilities and activities; industrial, manufacturing and other economic development facilities and activities; antipollution and air, water, ground and subsurface pollution abatement and control facilities and activities; airport and water port and related facilities, services and activities; and facilities, property and equipment of any nature for the use or occupancy of the state or the United States...

In the Deficit Reduction Act of 1984, the Congress, apparently concluding that tax exempt "municipal" bonds had become too much of a good thing, began imposing restrictions and limitations upon both the purposes for which such bonds could be issued and the amount which would be accorded tax exempt status. Effective January 1, 1985, a money limit or cap on the amount of such private "municipal" bonds which could be issued was imposed upon all issuing agencies in each state. As subsequently amended, that provision is in 26 U.S.C. §146. The governor of each state was granted authority by the federal law to allocate the ceiling for each issuing agency in that state. Louisiana's then governor issued an executive order which allocated sixty percent of the state's total dollar limit to the Louisiana Public Facilities Authority. Since January 1, 1985, then, the Authority has become the biggest player in the game in Louisiana.

The complaint alleges that since its inception in 1974, the Authority has consistently used only Hicks or the law firm of which he was a member as bond counsel and that, because the Authority controls the giant's share of all tax exempt municipal issues in Louisiana, it and the other defendants have conspired to and are in engaging in a monopoly of bond counsel services in Louisiana. The Authority and the other defendants freely admit that it uses the services of Hicks and the other defendants on almost every bond issue and that it has never used the plaintiff law firm.

The Authority has no taxing power[2] and issues revenue bonds for projects to be constructed and operated by others. The bonds are to be repaid from the revenues of the project and, although the bonds are issued in the Authority's name, it assumes no responsibility for repayment (it is conceivable, under the law, that the Authority

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2. Section 2347 I specifically provides that all bonds issued by such a trust "shall be special obligations of the trust and shall be deemed to have been issued on behalf of the beneficiary of the trust. In no event shall any bonds, notes or other evidences of indebtedness of a trust constitute an obligation, either general or special, of the state of Louisiana or the beneficiary of the trust...and the bonds shall contain a recital to that effect."

could have some liabilities, although not directly for payment of the bonds).[3]

It is undisputed that the conduit tax exempt bond process begins with an interested project owner, say a hospital district (or a private hospital) which wants to expand. The tax exempt bonds are issued by the Authority, are sold to a bank, a group of banks, or to underwriters who regularly deal in such bonds. The bonds are paid out of the revenues of the hospital, usually through a bank which acts as a paying agent. The Authority names a lawyer to represent it as "special counsel" and the Authority requires that his fees be paid out of the proceeds of the bond issue. The Authority also names "bond counsel," usually Mr. Hicks, and requires that his fees also be paid out of the proceeds of the bond issue. On larger issues and those which are not "presold" to a bank or group of banks, additional bond counsel from New York or Chicago or other metropolitan areas may also be necessary because the underwriters require such an opinion. The opinion of bond counsel as to the validity and tax exempt status of the bonds is frequently printed on the bonds themselves. Each of these defendants asserts that the Authority is simply exercising its fundamental right to choose its own lawyer in such a scenario. Each motion for summary judgment presents three claims: (1) the manner in which the bond counsel is chosen does not violate the anti-trust laws; (2) the activities of the Authority are immunized from anti-trust laws by the "state action doctrine;" and (3) the activities of the private defendants (Hicks and the two law firms) are shielded from anti-trust laws by the Noerr-Pennington Doctrine.

I.

Plaintiff claims that the activities of the defendants constitute a *per se* violation of §1 of the Sherman Act because it is an illegal tying arrangement: the defendants tie obtaining bond proceeds to the use of the legal services of lawyers selected by the Authority as bond

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3. Section 2347 A(2) provides, "All such bonds shall be negotiable instruments, and shall be solely the obligations of the trust and not of the state of Louisiana or the beneficiary. The bonds and the income thereof shall be exempt from all taxation in the state of Louisiana. The bonds shall be payable out of the income, revenues and receipts derived or to be derived from the trust properties and facilities maintained and operated by the trust or received by the trusts from any other sources whatsoever, including, but not by way of limitation, other moneys which, by law or contract, may be made available to the trust ..."

counsel. Plaintiff also makes claims of boycott and exclusive dealing under §1 and of monopolization, attempted monopolization and conspiracy to monopolize under §2.

The defendants rely primarily upon cases such as *Forrest v. Capital Building & Loan Ass'n*, 385 F.Supp. 831 (M.D.La. 1973), aff'd, 504 F.2d 891 (5th Cir. 1974); *Shelby [Sibley] v. Federal Land Bank of New Orleans*, 597 F.2d [459] (5th Cir. 1979) [, cert. denied, *Board of Commissioners v. Federal Land Bank*, 444 U.S. 941, 100 S.Ct. 296, 62 L.Ed.2d 308 (1979)] and *Foster v. Maryland State Sav. & Loan Ass'n*, 590 F.2d 928 (D.C.Cir. 1978), cert. denied, [439 U.S. 1071] 995 (99) S.Ct. 842 [59 L.Ed.2d 37] (1979). See also, *Amey Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (11th Cir. 1985).

This line of cases holds that there is no Sherman Act violation when a private financial institution requires a borrower to pay for the legal services rendered to the institution in connection with certifying that the institution has a valid, enforceable first mortgage upon the property which secures the loan. These cases hold that in the financial institution-borrower situation, the legal service is simply an incidental part of the extension of credit services and that they are not two products, hence, there is nothing to be tied.

The defendants argue that these cases apply to this situation and that under the undisputed facts, there is clearly no violation of the Sherman Act.

Initially we note that the defendants are incorrect as to the similarity of the Authority to the lending institution in the usual mortgage loan situation. The Authority when it issues bonds is the *borrower*, not the lender. Technically, the Authority issues the bonds, thereby borrowing money from the ultimate purchaser--the investing public.

Assuming, however, that some anti-trust violation can be made under these facts, the court is convinced that the other arguments of the defendants are sound.

II.

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court held that the Sherman Act does not apply to the anti-competitive conduct of a state "acting through its legislature." The court indicated that the decision rested on principles of federalism and state sovereignty. That case involved the

California Agricultural Probate Act, a state statute which restricted competition among food growers in California. The court commented:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. 63 S.Ct. at 313.

The court also pointed out, however, that the states do not have authority to grant immunity to those private parties who violate the Sherman Act "by declaring that their action is lawful." 63 S.Ct. at 314.

Subsequent decisions by the Court have made plain that local subdivisions of the state, as opposed to the state itself are not beyond the reach of the anti-trust laws by virtue of their status because they are not themselves sovereign. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, at 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 25 (1985), the Court concluded that the active state supervision requirement imposed upon private parties claiming such exemption, will not be imposed in cases in which the actor is a municipality. In a footnote, the court indicated without deciding that where the actor is a state agency, it is "likely" that active state supervision will also not be required. 105 S.Ct. at 1720, n. 10.

The defendants here claim that the authority is a state agency. It clearly is neither the state itself nor a municipality.

As we have seen, under §2341 D, the Authority is a public trust and public corporation of the state. It is authorized to provide funding for "any authorized public function or purpose of the state." Every trustee is subject to the provisions of the law on public payroll fraud and public contract fraud and is required to take the oath of office required of public officials. §2343 A. Meetings of the trustees are required to be open to the public and records are required to be public records and all contracts for construction, labor, equipment, material or repairs must be awarded according to the state's public

bid laws. §2343 D and E. Trustees may be removed from office for malfeasance. §2343 F(2). All public trusts are subject to the supervision of the legislative auditor of the state to the same extent as the public beneficiaries and such trusts are audited on an annual basis by the legislative auditor. §2346. All bond issues must be submitted to and approved by the state bond commission and attorneys fees incurred in connection with the issuance of bonds shall be subject to approval of the attorney general. §2347 H & K.

In *Harris v. Trustees of Louisiana Public Facilities Authority*, 356 So.2d 1093 [1039] (La.App. 1st Cir. 1977), cert. denied, 357 So.2d 558 (La. 1978), the court held, quoting the trial judge:

> It is clear that a public trust authority created under the Public Trust Act is neither a political subdivision of the State nor a municipal corporation. It is a unique creature of the Legislature designated as a 'public corporation' in R.S. 9:2341. It is a corporation created by the Legislature and empowered to act for public purposes. 356 So.2d at 1041.

It is clear that the Authority is a public agency created by the state and that it performs public functions. The jurisprudence has extended the public immunity doctrine to similar special purpose public agencies. See *Cine 42nd St. Theatre Corp. v. Nederlander Org. Inc.*, 609 F.Supp. 113 (S.D.N.Y. 1985), aff'd, 790 F.2d 1032 (2d Cir. 1986); *Caribe Trailers System v. Puerto Rico Maritime*, 475 F.Supp. 711 (D.D.C. 1979); *W.E. [E.W.] Wiggins Airways v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.1966), cert. denied, 385 U.S. 947 [87 S.Ct. 320, 17 L.Ed.2d 226].

It is thus clear that the Legislature has authorized this public agency to issue bonds and to take all necessary steps in connection with the issuance. One of the necessary steps in connection with the issuance of bonds is the selection and employment of bond counsel. The court concludes that the Authority is a state agency and, as such, active state supervision of its activities is not required. *Town of Hallie v. City of Eau Claire*, supra. Accordingly, the court concludes that assuming the Authority's activities in connection with selection and employment of lawyers on bond issues amounts to anti-competitive activity within the meaning of the Sherman Act, those activities are shielded by the state action immunity of *Parker v. Brown*.

Cases subsequent to *Parker v. Brown* have made clear that not only the state itself is immune but also private parties who act pursuant to the state's policy decisions. See *Southern Motor Carriers Rate Conference, Inc. V. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), on remand, 764 F.2d 748 (11th Cir. 1985). In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the court held that a minimum fee schedule issued under the affirmative direction of the Arizona Supreme Court and enforced by its disciplinary rules constituted a restraint "compelled by direction of the state acting as sovereign" and thus the restraint was immune and the private lawyers were compelled to abide by the minimum fee schedule. On the contrary, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) and *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the court held that the Sherman Act was violated by publication of a minimum fee schedule issued by a county bar association and enforced by the state bar because there was no compelled state activities and that mere approval by a state rate making commission of a private utility's tariff which violated the Sherman Act was not compelled state activity beyond the reach of the Sherman Act.

As the court pointed out in *Southern Motor Carriers*, supra, the state action doctrine does not require a showing that the state *compelled* private anti-competitive conduct in connection with a state agency; a showing that the state *authorized* such private conduct is sufficient. See City of Lafayette v. Louisiana Power & Light Co., supra.

Here the selection of counsel is clearly made by the Authority, the public agency. The private parties, the lawyers, are simply selected to perform legal services for and on behalf of the public agency. The state legislature clearly authorized the Authority to employ bond counsel in connection with the issuance of bonds and placed no restrictions upon the Authority in that connection, except that the attorney general must approve the fee. This court concludes that these private parties who are contracting with the public agency are also shielded by the state immunity doctrine, assuming that the practice would amount to a violation of the Sherman Act if engaged in by private parties alone. Under these circumstances, it is not necessary to pass upon the other issues in the case.

Accordingly, the motion for summary judgment on behalf of each defendant is hereby GRANTED and there will be judgment in favor of the defendants dismissing this action. Baton Rouge, Louisiana, October 25, 1988.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX B

"UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BENTON, BENTON & BENTON, A Professional Law Corporation — CIVIL ACTION

VERSUS — NO. 85-969-A

THE LOUISIANA PUBLIC FACILITIES AUTHORITY, ET AL

J U D G M E N T

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that defendants' motion for summary judgment is hereby GRANTED and plaintiff's suit is hereby DISMISSED.

Baton Rouge, Louisiana, November 8, 1988.

s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA"

APPENDIX C

"IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3885

BENTON, BENTON & BENTON, A Professional Law Corporation,
Plaintiff-Appellant,
versus
THE LOUISIANA PUBLIC FACILITIES AUTHORITY, A Louisiana Public Trust and Public Corporation, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 30, 1990, 5 Cir., 198_, ___F.2d _____)

(May 17, 1990)

Before JOHNSON, WILLIAMS, and GARWOOD, Circuit Judges.

PER CURIAM:

(X) The petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ Jerre S. Williams
United States Circuit Judge"

APPENDIX D

FEDERAL AND STATE STATUTORY PROVISIONS

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

* * * *

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * * *

§2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * * *

LOUISIANA REVISED STATUTES, TITLE 9

* * * *

§2341. Public trusts authorized; purposes

A. Express trusts may be created or amended to issue obligations and to provide funds for the furtherance and accomplishment of any authorized public function or purpose of the state or of any parish, municipality, political or governmental subdivision or any other governmental unit in the state in real or personal property, or either or both, or in any estate or interest in either or both, with the state, or any such governmental units as the beneficiary thereof by and with the: (1) express approval of the governor and two-thirds of the elected members of each house of the legislature if the state of Louisiana or any state agency is the beneficiary; (2) express approval of a majority of the membership of the governing authority of the beneficiary and the State Bond Commission or its successor if a parish or municipality or a political or governmental subdivision thereof is the beneficiary; and (3) express approval of a majority of the membership of the governing authority of the beneficiary and the State Bond Commission or its successor, in all other cases. The beneficiary of any such trust is authorized to utilize the trust to issue obligations to accomplish any of the foregoing authorized public functions or purposes of the beneficiary. Provided, that no funds of said beneficiary derived from sources other than the trust property, or the operation thereof, shall be charged with or expended for property of or the operation of said trust, except by express action of the legislature or the governing authority of the beneficiary, as the case may be, prior to the charging or expending of the funds. The officers or any other governmental agencies or authorities having the custody, management or control of any property, real or personal or both, of the beneficiary of such trust, or of such a proposed trust, which property shall be used for the execution of the trust purposes, are authorized and empowered to lease such property for said purposes in accordance with law, after the acceptance of the beneficial interest therein by the beneficiary.

B. For purposes of this Chapter, authorized public functions or purposes of the state and of any parish, municipality, political or governmental subdivision or any other governmental unit in this state, except as otherwise and to the contrary provided by the laws of this state, shall mean and include, but not be limited to: hospital,

medical, health, nursery care, nursing care, clinical, ambulance, laboratory and related services and facilities; housing, mortgage finance and related services, activities, facilities, and properties; penitentiary, rehabilitation, incarceration and other correctional services and facilities; educational services and facilities and related housing and dormitory services and facilities; providing, developing, securing and improving water storage, treatment, supply and distribution services and facilities; sanitary and storm sewer and other liquid and solid waste collection, disposal, treatment and drainage services and facilities; educational or commercial communication equipment and facilities; mass transit, commuting and transportation, and parking services, equipment and facilities; cultural and civic facilities, services and activities; community development and redevelopment facilities and activities; gas, electric, petroleum, coal and other energy collection, recovery, generation, storage, transportation and distribution facilities and activities; industrial, manufacturing and other economic development facilities and activities; antipollution and air, water, ground and subsurface pollution abatement and control facilities and activities; airport and water port and related facilities, services and activities; and facilities, property and equipment of any nature for the use or occupancy of the state or the United States, or any agencies or instrumentalities thereof or of any governmental units in the state.

C. The trustees of a public trust shall make and adopt bylaws for the due and orderly administration and regulation of the affairs of the public trust. All bylaws of a public trust shall be submitted in writing to the governor of the state of Louisiana, if the state of Louisiana or any state agency is the beneficiary and, in all other cases, the governing authority of the beneficiary. The governor or the governing authority of the beneficiary shall have the power to veto all or part of the proposed bylaws. Failure to approve or veto the proposed bylaws within thirty days shall constitute automatic approval.

D. All public trusts hereafter created or amended under this Chapter shall constitute public corporations of the beneficiary, and as such shall have the powers and duties of such corporations, including the power to incur debt and contract obligations; to sue and be sued; to have a corporate seal; to do and perform all acts in a corporate capacity and in a corporate name. All public trusts created heretofore or hereafter shall be subject to the Public

Contracts Law, Public Records Law, Public Meetings Law, Code of Ethics, and the Bond Validation Procedures Law.

E. (1) Upon the application of one or more of the deep-water port commissions or deep-water port, harbor, or terminal districts as defined by Article VI, Section 44 of the Louisiana Constitution of 1974, as authorized by the governing board of such deep-water port commission or deep-water port, harbor, or terminal district, the governor of the state of Louisiana is authorized to create a public trust with the power to issue obligations, to guarantee loans, and to lend money for the purpose of financing and facilitating the import and export of goods, commodities, and services, and the financing of services connected with the import and export of goods, commodities, and services. The beneficiary of such a trust shall be the state of Louisiana. Only one such public trust shall be created in the state by the governor. The trust so created is authorized to issue obligations to accomplish its purposes.

(2) (a) The trust shall have the power and authority to issue and reissue obligations, bonds, notes, or other evidences of indebtedness having a term of fifteen years or less to finance its functions. The functions of the trust shall include but not be limited to: financing and facilitating the import and export of goods, commodities, and services; the financing of services connected with the import and export of goods, commodities, and services; promoting and developing the import and export of goods, commodities, and services; promoting and developing the deep-water ports, harbors, and terminals of the state; guaranteeing loans; and providing funds for the operation, maintenance, and administrative expenses of the trust. All such obligations shall be submitted to and approved by the State Bond Commission prior to the issuance and delivery of such obligations.

(b) All such obligations issued by the trust shall be negotiable instruments, and shall be solely the obligations of the trust and not of the state of Louisiana. The obligations and income thereof shall be exempt from all taxation in the state of Louisiana. The obligations shall be payable out of the income, revenues, and receipts derived or to be derived from the trust properties and facilities maintained and operated by the trust or received by the trust from any other sources whatsoever, including, but not by way of limitation, other monies which, by law or contract, may be made available to the

trust. In addition to the pledge of income, revenues, or receipts to secure said obligations, the trust may further secure their payment by any other security authorized in the resolution authorizing the issuance of the obligations. Such obligations shall be authorized and issued by a resolution adopted by a majority vote of the trustees present and voting and shall be of such series, bear such date or dates, mature at such time or times, bear interest at such rate or rates, be in such denominations, be in such form, carry such registration and exchangeability privileges, be payable at such place or places, be subject to such terms of redemption and be entitled to such priorities on the income, revenues, and receipts of the trust and contain such other provisions as such resolution may provide. The obligations shall be executed in the name of the trust in the manner provided in the resolution authorizing the issuance of such obligations. Such obligations may be sold in such manner and from time to time as may be determined by the trust to be most beneficial and the trust may pay all expenses and commissions which it may deem necessary or advantageous in connection with the issuance and sale thereof.

(c) Obligations issued hereunder are hereby declared legal investments and are hereby made securities in which all insurance companies and associations and other persons carrying on an insurance business, trust companies, banks, bankers, banking associations, savings banks, and savings associations, including savings and loan associations, credit unions, building and loan associations, investment companies, executors, administrators, trustees, and other fiduciaries, pension, profit-sharing, retirement funds, and other persons carrying on a banking business, and all other persons who are authorized to invest in revenue bonds may properly and legally invest funds, including capital in their control or belonging to them. Such obligations are hereby made securities which may properly and legally be deposited with and received by any state or municipal or public officer or any agency or political subdivisions of the state for any purpose for which the deposit of revenue bonds is authorized by law.

(d) Any resolution authorizing the issuance of obligations shall be published one time in the official journal of the state of Louisiana; however, it shall not be necessary to publish any exhibits to such resolution if the same are available for public inspection and such fact is stated in the publication. For thirty days after the date

of publication, any person in interest may contest the legality of the resolution, any provision of the obligations to be issued pursuant to it, the provisions therein made for the security and payment of the obligations, and the validity of all the provisions and proceedings relating to the authorization and issuance of such obligations. After that time, no person may contest the regularity, formality, legality, or effectiveness of the resolution, any provisions of the obligations to be issued pursuant to it, the provisions for the security and payment of the obligations, and the validity of all other provisions and proceedings relating to their authorization and issuance, for any cause whatever. Thereafter, it shall be conclusively presumed that the obligations are legal and that every legal requirement for the issuance of the obligations has been complied with. The bonds shall not be contestable after the thirty days.

(3) The trust shall have the power to lend money at competitive rates of interest, and to guarantee loans, in order to facilitate the functions of the trust set forth in R.S. 9:2341(E)(2).

(4) Eight trustees of the trust shall be appointed by the governor of which one shall be appointed from each congressional district in the state, and one member shall be appointed by the governor from among the members of the governing board of each of the deep-water port commissions or port, harbor, or terminal districts which participated in the creation of the trust or which may thereafter apply to the governor for representation on the board of trustees. The trustees shall serve at the pleasure of the governor.

(5) The governor shall designate one member of the trust to serve as chairman. The trustees shall elect a vice-chairman and a secretary-treasurer from among the members of the trust.

(6) Except as otherwise provided herein the provisions of this Chapter shall be applicable to the public trust created under this Subsection. The provisions of R.S. 9:2347 shall not be applicable to the public trust created under this Subsection; however, all financial advisors fees and any underwriters discount may be approved in writing by the State Bond Commission and the attorney general's office.

(7) Any attorneys' fees in connection with the issuance of any obligations, notes, or other evidences of indebtedness shall be subject to approval of the attorney general.

(8) All obligations, notes, or other evidences of indebtedness issued by the public trust shall be special obligations of the trust and shall be deemed to have been issued on behalf of the beneficiary of the trust.

(9) In no event shall any obligations, notes, or other evidences of indebtedness of the trust constitute an obligation, either special or general, of the state of Louisiana within the meaning of any constitutional or statutory provision whatsoever, and the obligations shall contain a recital to that effect.

F. Each appointment by the governor shall be submitted to the Senate for confirmation.

* * * *

§2342. Mode of creation; acceptance of beneficial interest; amendments

A. Such trusts shall be created, organized, structured and empowered by written instruments or by will. In the case of written instruments, the same shall be subscribed by the settlor or settlors by authentic act or by act under private signature executed in the presence of two witnesses and duly acknowledged by the settlor or settlors or by the affidavit of one of the attesting witnesses and before the same shall become effective the beneficial interest therein shall be accepted by the governor and two-thirds of the elected members of each house of the legislature if the state of Louisiana or any state agency be the beneficiary, or by the governing body of any other beneficiary named therein, which power and authority of acceptance hereby is conferred upon the governor and the legislature and the governing bodies of the parishes, municipalities and other political and governmental units in the state. Thereupon the said instrument or will, together with the written acceptance of the beneficial interest endorsed thereon, shall be recorded in the official records in the office of the clerk of court of each parish wherein is situated any real estate, or any interest therein, belonging to said trust, as well as the parish wherein is located the trust property or wherein are conducted its principal operations. In the case of any trust of which the state of Louisiana or a state agency thereof shall be the beneficiary, a certified copy of such instrument or will and the instrument of acceptance shall be filed with the secretary of state. Upon the acceptance of the beneficial interest by the beneficiary as hereinabove authorized and provided, the same shall be and

constitute a binding contract between the state of Louisiana and the settlor or settlors, or the executor of the estate of the settlor, for the acceptance of the beneficial interest in the trust property by the designated beneficiary and the application of the proceeds of the trust property and its operation for the purposes, and in accordance with the stipulations of the trust instrument or will. Such trusts shall have duration for the term as shall be specified in the instrument or will creating said trust.

B. No public trust in which the state of Louisiana, any state agency, any parish or municipality, or any other political or governmental unit in the state is the beneficiary may be amended without a two-thirds vote of approval of the trustees of such trust. Provided further, that any such amendment shall be subject to approval as provided in Subsection (A) of Section 2341 of this Chapter.

* * * *

§2343. Trustees; appointment, powers; duties; term of office; compliance with Public Bid Law; Public Meetings Law, and Public Records Law

A. Every person becoming a trustee of a public trust shall be subject to the provisions of R.S. 14:138 and 14:140 and first shall take the oath of office required of public officials. Every trustee, officer, and employee of a public trust who handles funds of a public trust shall furnish a good and sufficient fidelity bond in an amount and with surety as may be specified and approved by a majority of the trustees, such bond to be in a surety company authorized to transact surety business in the state of Louisiana. The trustees may, at their election, purchase good and sufficient fidelity bonds. The oaths of office shall be administered by any person authorized to administer oaths in the state of Louisiana, and shall be filed with the secretary of state in the case of trusts wherein the state of Louisiana or a state agency is the beneficiary; in the case of trusts wherein a parish, municipality, political or governmental subdivision or other governmental units in the state is the beneficiary and in all other cases in the official records in the office of the clerk of court of the parish of the beneficiary's situs. Except as inconsistent with the provisions of this Chapter, trustees shall have those additional duties as are provided by the Louisiana Trust Code[1] for trustees appointed pursuant to such code. Trustees shall serve without compensation, but may receive a reasonable per diem as may be determined by the

trustees and be reimbursed for actual expenses incurred in the performance of their duties as trustees.

B. Any public trust that hereafter names the state of Louisiana or any state agency as a beneficiary shall have five trustees appointed by the governor of the state of Louisiana. The terms of the trustees shall be as follows: one member shall be appointed for a term of one year; one member shall be appointed for a term of two years; one member shall be appointed for a term of three years; one member shall be appointed for a term of four years; and one member shall be appointed for a term of five years. At the expiration of the term of each member and of each succeeding member, the governor shall appoint a successor who shall serve for a term of five years. Whenever a vacancy on such trust shall occur by death, resignation or otherwise, the governor shall fill the same by appointment and the appointee shall hold office during the unexpired term. Each member shall hold office until his successor has been appointed and qualified. The trustees shall elect a chairman, a vice chairman and a secretary-treasurer from their own members.

C. Except as provided in R.S. 9:2343(F) for "ex officio" trustees who are members of the Louisiana legislature, any instrument or will creating a trust which is not within the scope of R.S. 9:2343(B) shall provide for the appointment, succession, powers, duties, term, manner of removal and compensation of the trustees subject to the provisions of Subsection F hereof, and in all such respects the terms of said instrument or will shall be controlling. If the instrument or will makes no provision in regard to any of the foregoing, then the general laws of the state shall control as to the omissions.

D. Meetings of the trustees of all public trusts shall be open to the public and the records of all public trusts shall be public records to the same extent as is required by law for the beneficiary.

E. All contracts of a public trust for construction, labor, equipment, material or repairs shall be awarded to the lowest responsible bidder who has bid according to the contract plans and specifications as advertised, in full accordance with the Public Contract Law, Chapter 10 of Title 38 of the Louisiana Revised Statutes of 1950; provided further, however, that this requirement shall not apply to projects or facilities of any public trust for the provision of industrial, manufacturing and other economic development facilities and activities.

F. (1) Trustees of any public trust hereafter created, not within the scope of R.S. 9:2343(B) shall be the members of the governing authority of the beneficiary or persons appointed by the governing authority of the beneficiary. However, any member of the legislature, all or a portion of whose district lies within the boundaries of the beneficiary of the public trust, shall be an "ex officio" trustee of that public trust if he consents in writing to be a trustee, whether or not that public trust was created prior to January 1, 1985.

(2) Trustees of any public trust hereafter created may be removed from office for cause, including incompetency, neglect of duty, or malfeasance in office, by a district court having jurisdiction.

(3) In the case of persons appointed by the governing authority of the beneficiary or by the governor, as the case may be, such persons shall be appointed for a term not in excess of six years, and shall be subject to removal for cause, as aforesaid, by or at the will of the beneficiary.

(4) In the event of removal of a trustee under this Section, a successor trustee shall be appointed in the same manner as aforesaid except in the case of trusts subject to R.S. 9:2343(B).

(5) However, in the event a trustee is so removed who is also a member of the governing body of a parish or municipal beneficiary, or a legislator who is an ex officio trustee, the successor trustee shall be appointed by the district court wherein the removal occurred. Said successor trustee shall serve only until the removed trustee ceases to serve as a member of the governing body of the parish or municipal beneficiary or as a member of the legislature and his successor on said governing body or in the legislature has qualified.

* * * *

§2344. Liability of trustees and beneficiary

A. No trustee or beneficiary shall be charged personally with any liability whatsoever by reason of any act or omission committed or suffered in the performance of such trust or in the operation of the trust property; but any act, liability for omission or obligation of a trustee or trustees in the execution of such trust, or in the operation of the trust property, shall extend to the whole of the trust estate, or so much thereof as may be necessary to discharge such liability or obligation, and not otherwise.

B. Any obligations issued by a public trust under this Chapter shall not constitute or create any debt or debts, liability or liabilities or a loan of the credit of or a pledge of the faith and credit of the beneficiary of the state or any political or governmental unit thereof but shall be solely the obligation of the public trust.

* * * *

§2345. Termination of public trusts

A. The acceptance of the beneficial interest in any public trust heretofore or hereafter created may be terminated by the beneficiary thereof at any time by the following methods, as applicable. Where the state or any state agency is the beneficiary, the acceptance is terminated by law duly enacted or by Concurrent Resolution of the Senate and House of Representatives. Where another governmental unit be the beneficiary, the acceptance is terminated by duly adopted ordinance or resolution of the governing body of the beneficiary as may be applicable.

B. Notwithstanding the provisions of Subsection A of this Section, the acceptance of the beneficial interest in any public trust heretofore or hereafter created shall not be terminated while there exists outstanding any indebtedness or other contractual obligations chargeable against the trust estate. The termination of the acceptance of the beneficial interest by the beneficiary of a public trust shall not prejudice nor affect any valid indebtedness or obligation of the trust; however, upon termination of the acceptance, the trustee or trustees shall have no powers or authority under the provisions of this Chapter, but shall be governed exclusively by the provisions of the Louisiana Trust Code, exclusive of Chapter 2-A of Title 9 of the Louisiana Revised Statutes, and by the laws of this state pertaining to charitable trusts.

* * * *

§2346. Audits; supervision by legislative auditor

A. Any public trust created hereunder shall be subject to the supervision of the legislative auditor of the state of Louisiana, to the same extent as the beneficiary thereof. Should the beneficiary thereof not be subject to the supervision of the legislative auditor, then provision shall be made in the instrument creating the trust for an annual, independent audit of the trust by a certified public accountant. Any such independent audit shall be subject to the

authority of the legislative auditor to prescribe and approve the terms and conditions of such audit as set forth in the provisions of R.S. 24:513(A).

B. Any public trust created hereunder in which the state of Louisiana is the beneficiary shall be audited on an annual basis by the legislative auditor as provided in R.S. 24:513 and such public trusts shall annually provide sworn statements of revenues and expenditures in accordance with R.S. 24:514.

* * * *

§2347. Bonds of public trust

A. To provide funds for and to fulfill and achieve its authorized public functions or purposes, a public trust may incur debt and issue bonds, notes or other evidences of indebtedness, hereinafter referred to collectively as "bonds" subject to the following: (1) If the beneficiary of the public trust is a parish, municipality or a political or governmental subdivision thereof, and such bonds or other debt obligations are issued for the purpose of providing, constructing, expanding, or altering public facilities which are to be operated, maintained or administered by any such parish, municipality or political or governmental subdivision thereof, such bonds shall be approved by a vote of a majority of the qualified electors of the beneficiary who vote in a special election held for that purpose in the manner provided by Subtitle II, Chapter 4, Part II of Title 39 of the Louisiana Revised Statutes of 1950. Furthermore, in all other cases, if the beneficiary of the trust is a parish, municipality or a political or governmental subdivision thereof, all bonds and other debt obligations shall be issued only after the trust has adopted an appropriate resolution giving notice of its intention to issue such bonds or other debt obligations, which resolution shall include a general description of the bonds or other debt obligations to be issued and the security therefor, and notice of this intention shall be published once a week for four weeks in a newspaper in the locality of the beneficiary or in the parish where it is located, the first publication to appear at least thirty days before the public meeting of the trust at which the trust will meet in open and public session to hear any objections to the proposed issuance of such bonds or other debt obligations. The notice of intent so published shall state the date, time, and place of the public hearing and shall state, and the law is hereby declared to be, that if at such hearing a petition

duly signed by electors of the beneficiary in a number not less than five per cent of the electors of the beneficiary voting at the last special or general election object to the issuance of the proposed bonds or other debt obligations, then such bonds or other debt obligations shall not be issued until approved by a vote of a majority of the qualified electors of the beneficiary who vote in a special election held for the purpose in the manner provided by Subtitle II, Chapter 4, Part II of Title 39 of the Louisiana Revised Statutes of 1950. Any such petition shall be accompanied by a certificate of the parish registrar of voters certifying that the signers of the petition are qualified electors of the beneficiary and the number of signers amounts to not less than five per cent of the electors in said beneficiary in number, voting at the last special or general election. Prior to the publication of the notice of intention required hereinabove, the contents of said notice of intention shall be approved by the State Bond Commission. All bonds and other debt obligations issued hereunder for the purpose of providing, developing, securing and improving the water storage, treatment, supply and distribution services and facilities and sanitary and storm sewer collection, disposal, treatment and drainage services and facilities, shall be issued in accordance with the provisions of Subpart B or C, Part I of Chapter 10, Title 33 of the Louisiana Revised Statutes of 1950, and/or any and all other laws of the state pertaining to revenue bonds for public utilities.

(2) All such bonds shall be negotiable instruments, and shall be solely the obligations of the trust and not of the state of Louisiana or the beneficiary. The bonds and the income thereof shall be exempt from all taxation in the state of Louisiana. The bonds shall be payable out of the income, revenues and receipts derived or to be derived from the trust properties and facilities maintained and operated by the trust or received by the trust from any other sources whatsoever, including, but not by way of limitation, other monies which, by law or contract, may be made available to the trust. In addition to the pledge of income, revenues or receipts to secure said bonds, the trust may further secure their payment by a conventional mortgage upon any or all of the properties constructed or acquired or to be constructed or acquired by it. Such bonds shall be authorized and issued by resolution adopted by a two-thirds vote of the trustees of the trust and shall be of such series, bear such date or dates, mature at such time or times, bear interest at such rate or

rates not exceeding the maximum rate at which revenue bonds of the beneficiary can be issued and sold, be in such denominations, be in such form, either coupon or fully registered without coupons, carry such registration and exchangeability privileges, be payable at such place or places, be subject to such terms of redemption and be entitled to such priorities on the income, revenues and receipts of the trust as such resolution may provide. The bonds shall be signed by such officers as the trust shall determine and one of such signatures may be facsimile. Coupon bonds shall have attached thereto interest coupons bearing the facsimile signatures of such officer or officers as the trust shall designate. Any such bonds may be issued and delivered, notwithstanding that one or more of the officers signing such bonds or the officer or officers whose facsimile signature or signatures may be on the coupons shall have ceased to be such officer or officers at the time such bonds shall actually have been delivered. Such bonds may be sold in such manner and from time to time as may be determined by the trust to be most beneficial and the trust may pay all expenses and commissions which it may deem necessary or advantageous in connection with the issuance and sale thereof subject to the provisions of Subsection (K) of this Section. (3) Bonds and notes issued hereunder are hereby declared legal investments and are hereby made securities in which all insurance companies and associations and other persons carrying on an insurance business, trust companies, banks, bankers, banking associations, savings banks and savings associations, including savings and loan associations, credit unions, building and loan associations, investment companies, executors, administrators, trustees and other fiduciaries, pension, profit-sharing, retirement funds and other persons carrying on a banking business, and all other persons who are authorized to invest in revenue bonds may properly and legally invest funds, including capital in their control or belonging to them. Such bonds and notes are hereby made securities which may properly and legally be deposited with and received by any state or municipal or public officer or any agency or political subdivisions of the state for any purpose for which the deposit of revenue bonds is authorized by law. Nothing contained herein shall authorize the investment of public pension or retirement funds in public trust bonds or other obligations.

B. The trust may in any resolution authorizing the issuance of such bonds enter into such covenants with the future holder or

holders of the bonds as to the management and operation of the trust properties or facilities, the imposition and collection of fees and charges for services and facilities furnished by the trust, the disposition of such fees and revenues, the issuance of future bonds and the creation of future liens and encumbrances against such facilities and the revenues therefrom, the carrying of insurance on the facilities, the keeping of books and records, and other pertinent matters, as may be deemed proper by the trust to assure the marketability of the bonds, provided such covenants are not inconsistent with the provisions of this Chapter. Any holder of the bonds or of any of the coupons thereto attached may by appropriate legal action compel performance of all duties required of the trust and officials by this Chapter or by the resolution authorizing the issuance of bonds if not inconsistent with the provisions of this Chapter. If any bond issued hereunder is permitted to go into default as to principal or interest, any court of competent jurisdiction may pursuant to the application of the holder of the bond, appoint a receiver for the facilities of the trust, which receiver shall be under the duty of operating the facilities and collecting and distributing the revenues thereof pledged to the payment of the bonds, pursuant to the provisions and requirements of this Chapter and the resolution authorizing the bonds. As hereinbefore provided, such bonds may in the discretion of the trust be additionally secured by mortgage on all or any part of the trust properties or facilities acquired, constructed, extended or improved with the proceeds thereof, and the trust shall have full discretion to make such provisions as it may see fit for the making and enforcement of such mortgage and the provisions to be therein contained.

C. If more than one series of bonds is issued hereunder payable from the revenues of any facility, priority of lien on such revenues shall depend on the time of delivery of the bonds, each series enjoying a lien prior and superior to that enjoyed by any series of bonds subsequently delivered, except that where provision is made in the proceedings authorizing any issue or series of bonds for the issuance of additional bonds in the future on a parity therewith pursuant to procedures or restrictions provided in such proceedings, additional bonds may be issued in the future on a parity with such issue or series in the manner so provided in such proceedings.

D. The trust may issue bonds under this Chapter payable from revenues to be derived from two or more facilities owned and operated by the trust (whether or not such facilities are related or

used in conjunction) for the purpose of constructing, acquiring, extending or improving any one or more of the facilities, which bonds may be additionally secured by a mortgage upon such facilities; provided, however, in no event shall the bonds constitute a claim against any property or revenue of the trust not specifically pledged or hypothecated for payment of such bonds.

E. Any resolution authorizing the issuance of bonds hereunder shall provide for the creation of a sinking fund into which shall be paid from the revenues of the trust properties and facilities financed by the proceeds of the bonds, subject only to prior payment of the reasonable and necessary expenses of operating and maintaining such properties and facilities, sums fully sufficient to pay the principal and interest of the bonds as the bonds become due and payable, and to create such reserve for contingencies as may be required by the resolution. The monies in the sinking fund shall be applied to the payment of interest on and principal of the bonds or to the purchase of retirement of the bonds prior to maturity in the manner provided in the resolution.

F. The trust may authorize the issuance of refunding bonds of the trust for the purpose of refunding outstanding bonds issued pursuant to this Chapter. Such refunding bonds may either be sold and the proceeds applied to or deposited in escrow for the retirement of the outstanding bonds, or may be delivered in exchange for the outstanding bonds. The refunding bonds shall be authorized in all respects as original bonds are herein required to be authorized, and the authority in authorizing the refunding bonds shall provide for the security of the bonds, the sources from which the bonds are to be paid and for the rights of the holders thereof in all respects as herein provided for other bonds issued under authority of this Chapter. The trust may also provide that the refunding bonds shall have the same priority of lien on the revenues pledged for their payment as was enjoyed by the bonds refunded.

G. It shall be provided in the resolution authorizing any bonds hereunder that such bonds shall recite that they are issued under authority of this Chapter. Such recital shall conclusively import full compliance with all of the provisions of this Chapter and all bonds issued containing such recital shall be incontestable for any cause whatsoever after thirty days from the date of publication of the notice of sale of the bonds as provided for hereinafter.

H. All bond issues of a public trust shall be submitted to and approved by the State Bond Commission prior to the issuance and delivery of said bonds. All bonds of a public trust shall be sold by the State Bond Commission. Provided, bonds of a public trust issued in connection with any projects or facilities of the trust for the provisions of industrial, manufacturing or other economic development facilities and activities shall be sold in accordance with the provisions of R.S. 39:991, et seq., subject to the requirement that a notice of intent to sell such bonds shall be published at least seven days in advance of the sale date. After approval by the State Bond Commission as required herein and at least seven days prior to the sale of such bonds by the State Bond Commission the public trust shall cause to be published a notice of sale in a newspaper of general circulation in the parish of the beneficiary's situs, or if the state or any state agency be the beneficiary, such publication shall be in the official state journal, and in a financial journal or newspaper containing a section devoted to municipal bond news published in either New Orleans, Louisiana or New York, New York. This notice of sale shall state if any proposals have been made for the purchase of the bonds and that other proposals will be considered and that the proposal most advantageous to the issuer will be accepted at the time of the sale. After adoption of the resolution or other proceedings authorizing the sale of bonds, said resolution or other proceedings shall be published in a newspaper of general circulation in the parish of the beneficiary's situs, or, if the state or any state agency be the beneficiary, such publication shall be in the official state journal. For a period of thirty days from the date of publication of the notice of sale, any person or persons in interest shall have the right to contest the legality of the notice of sale, resolution or other proceedings authorizing the issuance of the bonds and the legality of the bond issue for any cause, after which time no one shall have any cause or right of action to contest the legality of said resolution or other proceedings or of the bonds authorized thereby for any cause whatsoever. If no suit, action or proceedings are begun contesting the validity of the bonds within the thirty days herein prescribed, the authority to issue the bonds and to provide for the payment thereof, the legality thereof and of all of the provisions of the resolution or other proceedings authorizing the issuance of the bonds shall be conclusively presumed, and no court shall have authority to inquire into such matters. Such bonds shall have all the qualities of

negotiable instruments under the law merchant and the commercial laws of the state of Louisiana.

I. All bonds, notes or other evidences of indebtedness issued by a public trust shall be special obligations of the trust and shall be deemed to have been issued on behalf of the beneficiary of the trust. In no event shall any bonds, notes or other evidences of indebtedness of a trust constitute an obligation, either general or special, of the state of Louisiana or the beneficiary of the trust within the meaning of any constitutional or statutory provision whatsoever, and the bonds shall contain a recital to that effect.

J. If the bond issue of the trust requires the expenditure of any state funds in the acquisition of any facilities or properties for use by the trust or if any contractual obligation is to be undertaken or incurred by the state in excess of one year in connection therewith, a two-thirds vote of both the members of the State Bond Commission and the Joint Legislative Committee on the Budget approving such action shall be required as a condition to such action.

K. The trustee or trustees may employ a financial advisor to furnish services in preparing any bond issues for the issuance and may contract for the payment of his services provided however, no continuing fee arrangement with a financial advisor shall exist after the delivery of any bonds and all bond issues upon which the financial advisor provides services shall be sold only at an advertised public sale. All financial advisors fees and any underwriters discount must be approved in writing by the State Bond Commission and the attorney general's office. Any attorneys fees in connection with the financing and the acquisition or construction of the project to be financed shall be subject to approval of the attorney general. Whoever violates this Subsection shall be subject to the imposition of the penalties provided in R.S. 42:264.

L. All bonds heretofore issued under the provisions of Act 135 of the 1970 Regular Session of the Louisiana Legislature are hereby validated, ratified and confirmed and declared to be valid and binding obligations of the public trust in accordance with the terms of their

issuance. All proceedings heretofore had in connection with the issuance of such bonds are hereby ratified, validated and confirmed. However, the provisions of this Chapter shall apply to any new or additional bonds issued by any public trusts in existence at the time of the effective date of this Chapter, notwithstanding that said public trusts may have previously issued and have outstanding any bonds and/or notes.

* * * *

APPENDIX E

Excerpt from Indenture of Trust creating the Louisiana Public Facilities Authority, dated August 21, 1974, §§1.2, 6.3, 6.4 and 8.2.

"1.2. The undersigned Settlor hereby contracts with the undersigned Trustees, and the Trustees, as individuals and not as holders of public office, do hereby declare and covenant, between themselves and unto the Settlor and the State of Louisiana (hereinafter referred to as the "Beneficiary" and/or the "State"), that they and their successors do and will hold, receive and administer the Trust Estate as hereinafter set forth, as Trustees of a Public Trust under and pursuant to the Act, solely for the use and benefit of said Beneficiary for the public purposes and functions hereinafter set forth. This Trust is created by virtue of the execution of this Indenture of Trust (hereinafter referred to as the "Indenture") by the firm and individuals signing the same as the Settlor and initial Trustees hereunder. Neither the acceptance of the beneficial interest hereunder nor the endorsement hereon of such acceptance, for and on behalf of the designated Beneficiary as provided by law, shall be deemed or construed to be the creation of a Public Trust by said Beneficiary."

"6.3. At the end of the term of a Trustee, a successor Trustee shall be appointed by the Governor of the Beneficiary from a list of eligible names to be prepared and submitted by the Board of Trustees of the Authority at least sixty (60) days prior to the end of each term. Upon the resignation, disability or death of any Trustee, a successor Trustee shall be appointed in like manner to complete the term of any such replaced Trustee. The approved successor Trustee shall take office upon written order of the Governor of the Beneficiary and upon compliance with the provisions of Section 6.13 hereof. Each successor Trustee shall be appointed for a term commencing on the dat of his written order of appointment and ending at 12:01 A.M. on the sixth anniverary of the date of expiration of his predecessor's term of office."

"6.4. As soon as practicable after any Trustee of the Authority shall resign, die, be removed, become incapable of acting as such Trustee, or remove his residence from the State of Louisiana, a successor to such Trustee shall be appointed, in the manner set forth

in Section 6.3 above, to serve for the remainder of his predecessor's term of office."

"8.2 The Beneficiary shall have no legal title, claim or rights to the Trust Estate, its income, or to any part hereof, or to demand or to require any partition or distribution thereof. Neither shall the Beneficiary have any authority, power or right whatsoever, to do or transact any business for on behalf of, or binding upon the Trustees or upon the Trust Estate, nor the right to control or benefits of this Trust, as administered by the Trustees hereunder; and at the termination of the Trust, as provided hereinafter, and then only, the Beneficiary shall receive the residue of the Trust Estate."

See Record, Vol. I, pps. 218, 226 and 237.

APPENDIX F

Executive Order No. 71, issued by Governor Edwin Edwards on August 21, 1974

"STATE OF LOUISIANA
EXECUTIVE DEPARTMENT
BATON ROUGE

EXECUTIVE ORDER NO. 71

WHEREAS, there is a pressing need for facilities for the health, safety, walfare and economic well being of the people of Louisiana;

WHEREAS, the legislature for the State of Louisiana has made available pursuant to Art 135 of 1970, Louisiana Revised Statutes 9:2341-2347 of 1950, the Public Trust as a vehicle to finance projects necessary for the general welfare of the people of this state;

NOW, THEREFORE, I, Edwin Edwards, by virtue of the authority vested in me under the constitution and laws of the State of Louisiana, as Governor thereof, and pursuant to the provisions of Act 135 of 1970, Louisiana Revised Statutes 9:2341-2347 of 1950, hereby accept on behalf of the State of Louisiana the beneficial interest in that certain public trust entitled the Louisiana Public Facilities Authority, created by virtue of the execution of that certain declaration and indenture of trust dated the twenty-first day of August, 1974, and do hereby constitute and establish the State of Louisiana as the beneficiary of such trust.

IN WITNESS WHEREOF, I have hereunto set my hand officially and caused to be affixed the Great Seal of the State of Louisiana, at the Capitol, in the City of Baton Rouge, on this the 27th day of August A.D., 1974.

s/ Edwin Edwards
Governor of Louisiana

ATTEST
BY THE GOVERNOR

s/ Wade O. Martin, Jr.
Secretary of State"

APPENDIX G

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

"Before me, the undersigned Notary Public, personally came and appeared WILLIAM J. MOORE, who did take oath, dispose, and state as follows:

"My qualifications are set forth in the attached curriculum vita. I received my training in economics and statistics at the University of Texas at Austin, where I was awarded the B.A. degree in economics in 1964, the M.A. degree in economics in 1966, and the Ph.D. in economics in 1969. At the Ph.D. level I specialized in the areas of labor economics, industrial organization and antitrust law, and statistics. From 1968 to 1970, I held the position of Assistant Professor of Economics at the University of Oklahoma. From 1970 to 1980, I was an Assistant Professor and then Associate Professor of Economics at the University of Houston. For the next three and one-half years, I held the position of Distinguished Professor of Economics at Miami University in Oxford, Ohio. Since January 1985 I have been Professor of Economics at Louisiana State University.

"During my academic career I have authored or coauthored more than 30 professional papers in economic, law, and industrial relations journals. I am currently on the Editorial Board of the *Journal of Labor Research*. Over the past 16 years I have served as an economic consultant to several trade unions, NASA, the U.S. Department of Labor and a number of private corporations. Finally, I have provided expert economic testimony in court for a number of private law firms and for the Attorney General's Office of the State of Louisiana. I have examined the economic issues in this case and analyzed the available data. As a consequence, I have reached the following conclusions:

* * * *

"It is my opinion to a reasonable degree of certainty within my field that there is a relevant market for the provision of bond counsel services in the State of Louisiana. The leading participants in this market are law firms which specialize in municipal bonds or

large law firms, which have sections devoted to municipal bond issues. These firms are listed by name in column (1) of Table 2, which is discussed below. My examination of the Louisiana State Bond Commission records confirms that these are the leading participants in the bond counsel market in Louisiana. All of these are Louisiana based firms and as we shall see below out of state firms handle only a small percent of the Louisiana bond business.

"III. Quantative Analysis of the Relationship Between Lawyer Defendants and the LPFA

"The heart of the case is the arrangement between the lawyer defendants and the LPFA. I have researched that arrangement for the period 1974 through 1985. In Tables 1, 2, and 3, which are discussed in detail below, I show the extent of their dominance with that particular issuing authority. Based on the evidence presented in these tables, I would have to conclude there is now a monopoly in the market for bond counsel services.

"Since its inception, the LPFA has grown dramatically in terms of the absolute dollar amount of conduit bonds issued and in terms of its relative share of the conduit bond market and municipal bond market in general. In 1974 the LPFA issued a single bond issue of $7.7 million. By the end of 1983, the LPFA had issued approximately 200 conduit bond issues in the approximate amount of $1.4 billion. Our examination of the State Bond Commission records on file at the Louisiana State Archives reveals that LPFA bond issue activity has continued to expand in 1984 and 1985.

"The other leading issuer of conduit bonds in the State of Louisiana are the public trusts or industrial development boards (IDBs). Our review of the State Bond Commission records on the issuance of conduit bonds indicates that the LPFA has been issuing a larger number of such bonds in greater dollar amounts than have the IDBs collectively during the period 1979 to 1985. Thus, in terms of relative market share, both in number of issues and dollar amounts, the LPFA has expanded significantly in recent years. We have not yet accumulated the evidence on market shares for 1986 and 1987.

"The law firms named as defendant sin this case have increased their market share of the LPFA's conduit bond issues, the IDBs conduit bond issues, and the total number of conduit bond issues issued in the State of Louisiana in recent years. These law firms

hold a monopoly on LPFA bond issues. In fact, the defendants freely admit this fact in their *Memorandum in Support of Motion for Summary Judgment* (page 8). They do not, however, note their growth in market share and monopoly power in the IDB bond counsel market, which we shall discuss below. Given the tremendous growth in conduit bond issues over the past 20 years in the United States in general and in Louisiana in particular, there can be no question that the defendant law firms have increased their market share and monopoly power in the overall bond counsel market as well during the period since the LPFA was formed. We have not yet had time to accumulate all of the data on the overall bond counsel market in Louisiana.

"There can be no question but that the defendant law firms hold a monopoly on the LPFA's bond counsel business and that this represents a dominant share of the conduit bond counsel business in the State of Louisiana as well as a significant share of the total bond counsel business in the State. The purposeful exclusion of the Benton, Benton, and Benton law firm from conduit bond counsel market in the State of Louisiana represents a significant restraint of trade in my opinion.

"Monopoly Power and Restraint of Trade in the Louisiana Conduit Municipal Bond Market.

"In this section, we shall review the evidence concerning the extent of monopoly power and restraint of trade in the Louisiana conduit bond counsel market exercised by the four defendants, i.e. the LPFA, Steve E. Hicks ('Hicks'), the law firm of Foley, Judell, Beck, Bewley, Martin and Hicks (hereafter referred to as 'Foley ... Hicks'), and the law firm of McCollister, McCleary, Fazio, Mixon, and Holliday (hereafter referred to as 'McCollister ... Holliday'). Our evidence is obtained by tracing the distribution or market shares of bond counsel firms in the number of conduit bond issues issued by the LPFA and industrial development boards (IDBs) in the State of Louisiana for the period 1974 to 1985. Since the LPFA and IDBs issued the vast majority of conduit municipal bond issues within the State, we feel certain our data adequate reflect changes in market shares during this period.

* * *

"... It should be noted that for the LPFA and IDBs issues already examined we find that the dollar amount of bond issues at the LPFA

tend to be much larger than the dollar amount of bond issues by IDBs. This implies that our evidence presented herein on the monopoly power and restraint of trade activities of the defendants based on number of bond issues understates the true market effects in the conduit municipal bond market.

"To understand the figures presented below, it is necessary to trace the employment history of 'Hicks' in the Louisiana municipal bond industry. The following facts appear to be undisputed.

"(1) From 1974 to 1981 'Hicks' served as general counsel to the LPFA.

"(2) From 1974 to sometime in 1982 'Hicks' was employed in the law firm of McCollister, McCleary, Fazio, Mixon, Holliday, and Hicks (hereafter referred to as 'McCollister...Hicks').

"(3) For part of 1982 'Hicks' worked in his own municipal bond firm, Hicks, Selvidge, and McConnell.

"(4) Sometime in 1982 the 'Hicks' law firm merged into the Defendant law firm, Foley, Judell, Beck, Bewley, Martin, and Hicks (hereafter referred to as 'Foley...Hicks').

"(5) As noted above, from its inception in 1974, the LPFA has usually selected as bond counsel 'Hicks' and/or the law firm with which he was associated, i.e. 'McCollister...Hicks' (1974 to 1981), Hicks, Selvidge, and McConnell (1982), and 'Foley...Hicks' (1983 to present).

"The practice of the LPFA to employ almost exclusively 'Hicks' firms as bond counsel for its bond issues clearly excludes other qualified bond counsels such as the law firms of Benton, Benton, and Benton, from this expanding sector of the municipal bond market. In their *Memorandum in Support of Motion for Summary Judgment* (page 8), the defendants justify their practice of almost always hiring a 'Hicks' firm as bond counsel on the grounds 'the LPFA has and will continue to select the most qualified bond counsel on a transaction by transaction basis.'

"The Defendants provide no basis for their implicit argument that the current 'Hicks' firm is practically always the 'most qualified' bond counsel. In an open competitive market an economist would not expect the employment decisions of 'Hicks' and a few close associates to have much effect on the relative quality of bond

counsel firms and their market shares. I have prepared Table 1 based on the records of the State Bond Commission and data provided by the LPFA to the plaintiff. The effects of 'Hicks' employment changes on the distribution or market shares of bond counsel firms for LPFA projects for the period 1974 through 1985 are reported in Table 1. For the period 1974 through 1981 all but one of the LPFA projects was assigned to 'McCollister...Hicks.' In 1982 'Hicks' split his time working for his own firm, Hicks, Selvidge, and McConnell, which subsequently merged into 'Foley...Hicks.' These two firms received 87.8 percent of the LPFA's bond counsel business for that year. Since 1982 Hicks has remained a partner with 'Foley...Hicks,' and that firm has maintained approximately 85 percent of the LPFA's bond counsel business in 1983, 1984, and 1985. During this period, almost all of the remainder of the LPFA's bond counsel appointments went to Hicks' former firm, 'McCollister...Holliday.' As shown in the bottom row in Table 1, throughout its entire history up to 1985, the LPFA selected a current Hicks' firm or a former Hicks' firm as its bond counsel. The two defendant law firms have received almost 100 percent of the LPFA's bond counsel business to the exclusion of many other qualified municipal bond law firms.

"A number of these firms have extensive experience as bond counsel for conduit municipal bonds issued by IDBs. Table 2 reports this activity for 17 identified bond counsel firms and a single catchall category for other Louisiana firms and for out of state firms. It is most revealing to compare the market share of the current Hicks' firms, reported in row 21, in this sector of the bond counsel market with that obtained through the LPFA. During the period 1979 to 1981 when Hicks worked for 'McCollister...Hicks,' that firm never received more than 2 percent of the IDBs' bond counsel business, while it was obtaining 100 percent of the LPFA bond counsel appointments. It also should be noted that the dominant bond counsel firm in IDB projects for the 1979 through 1981 period was Foley, Judell, Beck, Bewley and Martin (hereinafter referred to as 'Foley...Martin,' as shown in row 8 of Table 2. During this period, Hicks was not practicing with this firm. For these same years, this dominant firm, or should we say 'most qualified firm,' received no bond counsel business from the LPFA, as reported in row 2 of Table 1.

"In 1982, when 'Hicks' split his time between Hicks, Selvidge, and McConnell and 'Foley...Hicks,' these two firms obtained 20.4 percent of the IDB bond counsel business. Again, it is important to note that during the observation period when 'Hicks' was employed by 'McCollister...Hicks' and Hicks, Selvidge, and McConnell, these firms handled a smaller share of the IDB's bond counsel business than did the plaintiff firm of Benton, Benton, and Benton, as shown by row 2 in Table 2. Of course, during the same period the Benton firm was bond counsel on no LPFA issues, because the 'Hicks' firms were employed almost 100 percent of the time.

"With the merger of the Hicks, Selvidge, and McConnell firm into the 'Foley...Hicks' firm in 1982, the latter's share of the conduit bond counsel market increased significantly. As shown in rows 8 and 9 of Table 2, the combined totals for the 'Foley...Martin' and 'Foley...Hicks' firms has remained at approximately 60 percent of the IDB market. During this period since 1982 the 'Foley...Hicks' firm received approximately 85 percent of the LPFA bond counsel business as noted in Table 1.

* * *

"In line 9 of Table 3 we report the number and the percent of the total bond counsel appointments given to current 'Hicks' firms plus his former firm, 'McCollister...Holliday,' by the LPFA and IDBs combined for each year. The fact that the LPFA has given these two firms virtually 100 percent of its bond counsel business combined with the fact that the LPFA's share of the conduit bond market has increased over the years accounts for the dramatic rise in the conduit bond counsel market share for the two defendant firms of 'Foley...Hicks' and 'McCollister...Holliday', as reported in line 9 of Table 3. Between 1980 and 1984 their share of the Louisiana conduit bond counsel market increased from 23.1 to 83.2 percent based on LPFA and IDBs bond issues. Since these authorities issue the vast majority of conduit bond issues in the State, it is safe to conclude that the market power of these two firms has increased dramatically in recent years, and their virtual monopoly position as LPFA bond counsel has contributed to this fact. The LPFA essentially has made 'Hicks' firms its exclusive bond counsel. At the same time, the LPFA aggressively has expanded its role in the conduit bond market in the state of Louisiana. As a consequence, the law firm defendants have

increased their share of the bond counsel market to more than 83.0 percent.

"In this regard, it is interesting to note the market shares of the Hicks, Selvidge, McConnell firm and the 'Foley...Martin' firm when they merged to form the 'Foley...Hicks' firm in 1982. Prior to the merger in 1982, 'Foley...Hicks' had handled 49 bond counsel assignments for the LPFA and IDBs combined, which represented 36.6 percent of the total such assignments. At the same time, Hicks, Selvidge, and McConnell handled 22 such assignments representing 16.4 percent of the bond counsel assignments awarded by these authorities. After the merger, the 'Foley...Hicks' firm handled an additional 14 assignments, making the three firm collective market share for 1982 equal to 63.4 percent. At the time of their merger, these two firms were the largest firms in the State in terms of their share of bond counsel business awarded by the LPFA and IDBs.

"The Allocation of Issuer's Counsel at the LPFA and IDBs.

"In the Complaint filed by the Plaintiff it is alleged that once the LPFA adopted the 'Foley...Hicks' firm as primary bond counsel in 1982, it then adopted the defendant 'McCollister...Holliday' firm as primary issuer's counsel. This section of the Report deals with this question.

"Table 4 reports the facts on the distribution of issuer counsel for LPFA bond issues obtained by our examination of State Bond Commission records held in the Louisiana State Archives. We find a significant increase in the number and share of LPFA issuer counsel jobs awarded to the 'McCollister...Holliday' firm following the formation of the 'Foley...Hicks' firm in 1982, as reported in line 1 of Table 4. In 1985 'McCollister...Holliday' handled 56.5 percent of the LPFA's issuer counsel assignments.

"It is very important to note the number of times that 'Foley...Hicks' and 'McCollister...Holliday' are paired in doing LPFA's bond business in recent years. During the years 1983 through 1985 'McCollister...Holliday' served as issuer counsel to LPFA projects 71 times. In 70 of these projects 'Foley...Hicks' served as bond counsel, as shown in line 10 of Table 4."

* * *

Record, Vol. II, pp. 246-279.

APPENDIX H

Fred G. Benton, Jr. Affidavit of March 10, 1988, page 5

"The Retirement Center

"The Benton Firm was asked by the project sponsor to act as bond counsel for a $3.5 million nursing home project. The Industrial Development Board of the Parish of East Baton Rouge, Louisiana, Inc. approved the project and approved the employment of the Benton Firm as bond counsel. On the advice of the staff of the State Bond Commission Benton took the project to the LPFA to issue the bonds and requested the LPFA to approve Benton as bond counsel. Without notice and hearing, the LPFA approved the project but took no action with respect to the employment of the Benton Firm was bond counsel. Benton again requested that his firm be permitted to continue to act a bond counsel. A hearing was set, and Benton appeared before the LPFA board and requested approval of the Benton Firm as bond counsel. A member of the LPFA board moved the nursing home project be ratified and approved, including the employment of the Foley Firm as bond counsel. The resolution was unanimously adopted. Thereafter, this same member of the LPFA board advised that unless Benton stopped objecting to the employment of the Foley Firm as bond counsel, his motion to approve the nursing home project would be rescinded. Thereafter, the Benton Firm as removed from the project and not advised of any events concerning the issuance, sale and delivery of the bonds."

Record, Volume II, page 327.

APPENDIX I

Fred G. Benton, Jr. Affidavit of March 10, 1988, page 6

"Our Lady of the Lake Regional Medical Center Project

"Benton and the Benton Firm were invited by the board of directors of Our Lady of the Lake Regional Medical Center (the "hospital") to act as bond counsel in connection with the issuance of $60 million of bonds for the purpose of constructing new facilities and refunding the hospital's outstanding bond issue. Benton advised board members and Bob Davidge, the hospital's executive manager, of the LPFA's practice of employing the Foley Firm as bond counsel and disallowing Benton and any other bond counsel. Benton was advised that the hospital board did not want to work with Hicks again and wanted the Benton Firm to act as bond counsel for the $60 million issue. The hospital board adopted a resolution recommending to the LPFA the approval of the Benton Firm as bond counsel.

"Application was made by the hospital with the LPFA for a bond issue and to have the Benton Firm serve as bond counsel. When the LPFA took up the project, board members from the hospital present to ask for the employment of the Benton Firm as bond counsel were not invited to speak. The LPFA approved the hospital's application but employed the Foley Firm as bond counsel.

"With respect to the employment of the Benton Firm, Stokes McConnell of the Foley Firm suggested to Benton that the bond fee be divided 50/50 between the Benton Firm and the Foley Firm. This offer was declined by Benton.

"Victor Bussie, Hicks, Stokes McConnell and Mr. Antoon, a member of the LPFA board, met with some members of the hospital board and made statements that, in effect, constituted threats.

"Mr. Antoon said that it seemed to him that there was 'collusion between some members of the hospital staff and Mr. Benton, designed for the specific purpose of getting Mr. Benton employed as bond counsel.'

"Mr. Bussie said that the LPFA was not soliciting business; that he wanted a good relationship with the hospital, but that the hospital must do business the LPFA's way, that is, the hospital must accept the attorneys that the LPFA decided to employ; that if the hospital desired to proceed with their project with the LPFA, the hospital

was going to have to decide to do what the LPFA wanted to do. Hicks made a point-blank threat that the annual fees that the LPFA had previously waived charging the hospital under the old bond issue could be reinstated. Mr. Bussie denied that this would ever be voted back, contradicting Hicks' statement.

"Mr. Bussie stated that the Attorney General sets the fees and 'we abide by his schedule'.

"Immediately following the meeting, Mr. Davidge and Benton discussed the continued participation of the Benton Firm in the project, and it was agreed that the Benton Firm should be terminated in the best interest of the hospital and that Davidge would write Benton a letter to that effect.

"The next day, Davidge wrote a letter to Benton expressing appreciation for the work performed by Benton and that 'It is unfortunate that the existing system does not allow us to engage your firm without doubling our coverage for bond counsel...it is now evident that we are going to have to pay the full fee for bond counsel with the Foley-Judell firm selected by the LPFA...we have discussed this and agreed it would be unfair for you, and we are releasing you from any further obligation on our 1985 bond issue and terminating our agreement."

Record, Volume II, page 328.

APPENDIX J

Fred G. Benton, Jr. Affidavit of March 10, 1988, page 7

"Sewer Privatization

"East Baton Rouge Parish needed to construct $230 million of improvements to its sanitary sewerage system in order to comply with the Clean Water Act and regulations of the Environmental Protection Agency and Louisiana Department of Environmental Quality. Mayor Pat Screen and the Council desired to acquire the sewer improvements through an agreement with a private engineering and operating company that would finance, construct and operate required sewerage system improvements, with the Parish obligated to levy and collect user fees and pay sums to the private financier, contractor and operator (the 'Privatizer') for the package over 30 years, plus cost increases.

"As bond counsel for the Parish, Benton advised the Mayor and Council that 'privatization', in his opinion, was not authorized under Louisiana law. Nevertheless the Mayor and Council proceeded with a 'dual track approach', consisting of 'privatization' plus conventional bonding with user fee revenues.

"One of the privatizers obtained City-Parish approval to make an application to the LPFA for the issuance of $98 million of industrial development bonds for the sewerage system.

"The application was presented to the LPFA by Benton, acting as bond counsel for the $98 million issue. The Benton Firm had provided services of bond counsel to the Parish of East Baton Rouge in the sewer improvement project for a long time. Benton specifically made application to be accepted and recognized by the LPFA as bond counsel for this project. The LPFA approved the project but employed the Foley Firm as bond counsel.

"The LPFA minutes show that Mr. Bussie announced that Mr. Steve Hicks with the Foley Firm had been named as bond counsel for the issue. Mr. Bussie called on Hicks for comments. When Mr. Bussie announced that Hicks had been selected as bond counsel, the LPFA board of trustees had not yet adopted any official action employing the Foley Firm as bond counsel.

"After Hicks concluded his remarks, Mr. Bussie recognized Benton, who stated that the Benton Firm had been working on the

Baton Rouge sewer project over a long period of time, and his firm desired to continue to work on the sewer project.

"Mr. Bussie then acknowledged Benton's remarks and told him that if Benton felt that the LPFA was in violation of the law, the board had no problem with Benton going into court to try the question; that Bussie and members of the LPFA board had no intention of changing the policy of the employment of bond counsel and asked that the record reflect Benton's remarks to the board. Thereupon, the minutes show that the resolution approving the project and appointing bond counsel was moved by trustee Antoon, seconded by trustee Dabadie and unanimously adopted."

Record, Volume II, page 330.

APPENDIX K

Fred G. Benton, Jr. Affidavit of March 10, 1988, page 8

"$1.3 Billion Unemployment Compensation Bond Issue

"The State of Louisiana unemployment compensation fund owed the United States Government a large sum of money.

"Under federal law, each year the Louisiana debt remained unpaid the rate of taxation was increased, so that unemployment taxes in Louisiana were becoming extraordinarily high and burdensome to employees with each succeeding year.

"A tax-exempt bond issue was considered as a means to reduce the tax. The proceeds of the bonds would be used to pay off the debt due the United States Government. The longer term of the bonds would allow the debt to be spread out and paid over a longer period of time. The interest rate on the debt could be lowered from the current federal rate. The unemployment compensation tax could thereby be reduced, provided that unemployment compensation benefits were reduced.

"The Benton Firm was asked to work with members of the Louisiana Business and Industry Task Force on Unemployment Compensation (the "Committee") on the financing plan.

"In order to carry out this work, Benton sought to obtain information from the State Department of Labor, the LPFA and its agents and trustee banks for a prior bond issue by the LPFA to fund the interest portion of the debt. Such information was withheld from for some considerable period of time. The information requested by Benton was not provided in full at any time.

"The legislature was called into session and considered the proposed plan to issue bonds, and during the session Benton was requested and did review drafts of the bill on behalf of the Committee. Benton offered suggestions for improvements, corrections and additions. The bill passed.

"Under the bill the bonds were to be issued by the LPFA on behalf of the State.

"Benton and Chapman and Cutler, bond attorneys of Chicago, Illinois, presented proposals to the LPFA for said firms to act jointly as bond counsel, with tax opinion.

"After the proposals were submitted to the LPFA, parties unknown to Benton made telephone calls to Manly Mumford of Chapman and Cutler. Manly Mumford wrote letters to Mr. Bussie and the Bond Commission, which, in effect, withdrew the Chapman and Cutler proposal.

"In addition, the Chapman and Cutler proposal offered to provide the Blue Sky opinion for $10,000, for which a New York firm was to be paid $210,000.

"An accurate comparison of the two fees is as follows:

Benton Firm and Chapman and Cutler	
Bond Counsel Fee, Including Tax Counsel Opinion	$250,000
Blue Sky Opinion	10,000
Total	$260,000
As Compared With:	
Foley Firm Bond Counsel Fee .	$820,000
Kutak & Rock Special Tax Counsel Fee	550,000
Mudge, Rose Blue Sky Opinion and Securities Counsel* to Managing Underwriter ...	210,000
Total	$1,580,000

*Additionally, the McCollister Firm and another firm were employed and paid $715,000 to act as additional "underwriter's counsel".

Record, Volume II, page 332.

APPENDIX L

Fred G. Benton, Jr. Affidavit of March 10, 1988, page 10

"Dismissal of this Suit as a Condition for CAP Carry Forward.

"Prior to the end of 1985, it was necessary that the State of Louisiana "carry forward" unused tax-exempt bonding "capacity" ("CAP") as authorized under federal law. The State had a total of about $660 million in 1985, and approximately $113 million of that amount had not been used in 1985, and the unused amount could be carried forward for three years.

"Benton prepared the necessary documents for the CAP carry forward for the Baton Rouge sewer privatization project, which required the Governor's proclamation.

"A threat was made to Benton that unless Benton dropped the present lawsuit the Governor's proclamation would direct that the carry forward be issued to Hicks and the LPFA, rather than to Benton and the East Baton Rouge IDB board. Benton declined to drop the suit."

Record, Volume II, page 332.

APPENDIX M, Part 1

Excerpt from Fred G. Benton Deposition, February 26, 1986, pps. 113-126

"...Mr. Connick then began to ask a series of questions. First of all he asked to approve the project. He got that out of the way. Didn't change bond counsel, just approve the preliminary agreement and ratification, whatever it was. I think it might have involved ratifying bond counsel. Then he gave me my hearing.

"He then proceeded, as I made my little speech about objecting and my theory about how this board cannot do what they are doing and that I think, very respectfully, that it was an opportunity here--that I'm serious enough about this to litigate it, not any threat, not any improper throwing my weight around as a lawyer, because we know what we are. We are just a guy with a pair of pants on. We've got to go to the bathroom like any other man.

"In a normal way, I told him in a nice way how I felt about this and that I objected to it in a nice way, a very gently, very professional, nice way. And somewhere along the line of that conversation Mr. Connick got tired of it, and he said, 'Mr. Benton you're either going to accept what we've done, or I'm going to move to appeal this approval of your project.'

"And I told Mr. Connick, 'Well under those circumstances I'm going to sit down, because I don't want to hurt this project,' and I sat down.

"Now, that's the first step that I went up there. The second time was the Lady of the Lake, and the third time was the privatization project for East Baton Rouge in which the firm of Owen and White, Jean Owen, and Metcalf and Eddie, proposed to issue up to $98 million of bonds, and the mayor, Pat Screen and I, in the mayor's office, discussed this application with Mr. Jean Owen, and the mayor and I both pointed out, and it was agreed to, that this application of the LPFA would be on behalf of whoever the privatizer turned out to be, that we felt as a matter of diligence that the city and Parish of East Baton Rouge should have LPFA official action, but that we were going to go up there with Metcalf and Eddie and one of the privatizers--and at that time there were 4 competing firms--that we were not intending to give any preference.

"What we wanted was the official action, because we took companion official action with the Industrial Development Board. Official action becomes very important sometimes with federal grandfather bond counsel laws, and the mayor and I wanted to have official action on behalf of privatization of East Baton Rouge, and the language specifically declared that this action was not only given on name of this particular named applicant but on behalf of the other applicants thereafter and named the Parish of East Baton Rouge as the privatizers.

"When this action got up to LPFA, despite my request for special consideration as bond counsel under special circumstances which involved a city and parish for which for a long time I have worked in a number of capacities--in some cases I've defended cases as attorney-client--despite this long relationship with a complicated background, the LPFA peremptorily employed the Hicks firm and peremptorily adopted a routine resolution, which I believe--and I do not have a copy of that resolution, but I do not think that resolution carries out what we asked to do. I don't think it refers to the winner of the privatizer contest.

"Now, those are 3 specific examples. And this Lady of the Lake thing, the Lady of the Lake people interviewed me at meetings at the City Club. I advised them of the problem that I was having with the LPFA. They said, 'We want you to go ahead.'

"Well, at that meeting they just sized me up. They had the little sister who runs the hospital, several prominent members of the board.

"I didn't hear anything further from this for several weeks. Then finally I got a call from officials out at the hospital. We had another meeting out there, a meeting with the hospital director, and finally they said, 'We want you to be bond counsel. We do not want to work with Mr. Hicks. We want to work with you.'

"And they adopted a resolution which I helped them draw, because I was careful to not put them in a position to let them get in a position where they were demanding bond counsel, because I knew they had no right to demand bond counsel. All they could do was ask for consideration, which they did.

"Mr. Hicks went out and told the hospital director that, 'You're goint to have to use me.'

"The hospital director was furious over that meeting. They went down to the LPFA to protest and object to this and have an opportunity to state their case. When this thing came up, it went right through without any opportunity to be--they were not invited to make any speech. The thing was just approved and moved on to other things. And I wrote--Mr. Davidge was writing a letter of protest. I decided--I urged him to let me write this.

"Q. Who is Mr. Davidge?

"A. Mr. Davidge is the executive administrator of the hospital. I said, 'Let me write the letter,' and he agreed, 'because this could have an aftermath. It could get Mr. Bussie upset, Mr. Hicks upset at you. You may have personal repercussions. I'm the lawyer, so let it fall on my shoulders.

"We showed him the letter, he approved it, and we sent it over to them, and we objected to this, vigorously objected to it.

"Well, this was part of the issue of part of $59 million, and it was the first $9 million part of it...

"So we drew up some documents and had meetings with E. F. Hutton and Shearson and were working on timetables and the merits of the case, and I offered to do the project for 50 percent of the attorney general's approved schedule, for a number of reasons. One is that I was very complimented that I had been put in a position of being asked. Secondly, the nuns were very much thrilled to be working with me.

"They thought my brother is a great guy, because he is a defender of the Catholic Church, and went out and talked to Reverend Swaggart. Tommy knew Mother Theresa. They were very happy to have us there.

"Katherine Wheeler's mother had been a lifelong nurse at the hospital. She is a child of that hospital.

"And so we drafted a number of documents, got all set to go, and finally we reached the point where it becomes apparent it's going to be very awkward to issue the 9 million without tackling the 50 million.

"Now, up to this time the Foley firm had offered us 50 percent of the fee. I told them I couldn't necessarily accept any part of the fee without the hospital's approval, because we had agreed to do the

job for half the fee anyway, so, therefore, if we're going to go to 50 percent of a fee, which was a hundred thousand, which was something like 60,000, up to 120, well, the hospital would something to say about that, and they were not going to approve that, because they were trying to push everybody back, save the money to build the project with, and not be paying lawyers and bankers, and everything.

"I sat there and saw the hospital negotiate with E. F. Hutton to bring their fee down to one percent, which was fantastic. We did the same thing. I wasn't going to accept that offer to accept half the fee without hospital approval, and I didn't think it should be done, as a matter of principal.

"So then Mr. Bussie and Mr. Hicks and another member of the board, Mr. What-You-May-Call-It from Alexandria, they came out in a meeting of certain members of that board, and they in effect told certain members of that board in my presence and the presence of Ms. Wheeler that they were very pleased and very comfortable with the Hicks firm, and they explained how they had an interest in naming bond counsel, and this had been fine, and they only had 2 defaults over a long period of time, and they wanted to continue that same arrangement, but that, basically, if you want to do business with us, you're going to have to do business our way, and that, therefore, if you want that bond issue, you're going to have to employ this other firm.

"Sometime in the course of that conversation Mr. Hicks chimed in and said, 'We're going to impose a fee, again, too, on you.' Something to that effect.

"Mr. Bussie put up his hand and said, 'No, we're not going to do that.'

"And I regarded Mr. Hicks' statement as a direct threat to them, because the fee that he was talking about was a fee that the LPFA used to charge to all of their project sponsers that Kevin Reilly and members of the bond commission jumped on the LPFA and made them stop, or some such there. I really don't know what the LPFA does on that, but I know that that fee was eliminated insofar as the hospital was concerned.

"And Mr. Hicks actually threatened to reimpose that fee, and it was done in the context that I and any other visitor to that room could not understand anything but that that constituted a potential

coercion threat to these board members, which Mr. Bussie flatly, in a courteous way, because Mr. Hicks and Mr. Bussie are good friends, and he simply nullified it and said, 'We're never going to do that.'

"Then, before the conversations concluded--and I think Mr. McCollister was there, too, because he's a witness to all of this--the subject got around to labor peace, got into a discussion of how peaceful and nice that Mr. Bussie's unions had been in the construction of the parking garage then just recently completed, and he mentioned the fact that this was his hospital, he loved to go there, and he was happy he didn't have to walk through any picket lines to get there. And I got the distinct impression that the whole subject of labor peace was inappropriate to these circumstances, and so the that afternoon I called Mr. Davidge.

"He and I got together. He said, 'Fred, you know, we've carried this fight about as far as we can do it without really doing damage to the hospital,' or something to that effect.

"I said, 'I agree with you. I think we better, because at the very outset, we're not making any crusade here to begin with. What we're trying to do is get the best job done for that hospital.'

"And this is about the third time I've been called out there, not only with Mr. Davidge and Mr. Harriman but other people at that hospital, to talk about their financing, because apparently something went wrong with that first bond issue and some people got upset, because they called me out several times to have some opinions expressed as to what we could do or what should be done.

"And the point is that our attempted relationship with the hospital on this project had got so clear that we were not to be able to participate without severe risk of incuring the wrath of Mr. Hicks and Mr. Bussie, that it represented a real liability as to whether this hospital could proceed or not.

"So we agreed that I would have to be terminated, but I asked Mr. Davidge to do this with a letter, because I wanted to make a positive event, and he wrote the letter, and I responded to the letter and resigned. So that that is a matter of record.

"And at the time we resigned, we had turned out an almost complete set of documents for the $9 million issue. We had attended meetings, and we had gone through all the procedures, and I mean LPFA procedures.

"This was not the first time that we've done all the LPFA documents. We did that on the nursing home. We did everything to get that bond delivered, as to the basic documents. That's a matter of record. We drafted them. We exchanged documents. We got corrections. And then at some point in time all the documents were summarily thrown out and redrawn on straight LPFA forms.

"And the funny thing is that if you all take the time to go into the changes that we made on our set of documents, you're going to find the LPFA documents, and on top of that we've come along and simply made some suggestions for changes that I think almost any lawyer could agree with.

"But the point is that we followed the LPFA procedures, we followed their documents, and we improved on them, and the things that they reestablished I respectfully submit that, if they would look carefully at that, they would say, yes, that's a better way to do it, not on only substantive stuff, on nitpicking things, but that's part of the deal as lawyers, to get it the best as we can get it.

"But we had a better document than they had, using the LPFA forms, and the point is that we have done the LPFA work exactly as they wanted it, and that work was arbitrarily thrown out at the point when Mr. Hicks and his group got fed up with our work on that.

"They just simply threw us out, proceeded to deliver the bonds without giving us notice of when the bond delivery was occurring, slicing off our participation in mid air.

"There is no firing there. That was just simply a point at which we no longer received any communications, and we were terminated, and to this day we have never been reimbursed even our out-of-pocket cost, which it several hundred dollars, maybe over a thousand dollars, plus all this drafting.

"So my answer to your question is these 3 specifically. And I can name a number of others, but these are the ones that can be proven without any peradventure of a doubt in which we were working, and the rug was jerked out from under us at some critical point in the thinking of the LPFA where they had enough of us and they wanted us out of the picture, and, that's the end of it.

"Now, that's the answer to your question.

"Q. I've long since forgotten what the question was, but I take it, sir, that you were never--you say you were thrown out. You were never hired by the LPFA, were you?

"A. That's not correct. The LPFA, in a--

"Q. On none of these projects did the LPFA employ you as bond counsel?

"A. In the LPFA? Of course, I just described all that to you. But I want to remind you of this. The LPFA wanted us to function in that strange role of bond counsel to the sponsor.

"Q. Did you not have that right?

"A. There's no such place as that.

"Q. Why not?

"A. Because the sponsors have their own lawyer. And if they have a bond lawyer, why should they have to be paying 2 bond lawyers? They don't have to do that.

"Q. Well, the issue then, simply, sir, is that you are now saying that if Our Lady of the Lake or City of East Baton Rouge or the retirement center wanted the comfort of your particular opinion as opposed to the Foley, Judell opinion, they could get it, but LPFA did not choose to retain you as bond counsel, is that not a fact?

"A. That's exactly right.

"Q. Okay.

"A. But it's also right that, if they do that, they are going to have to be willing and prepared to pay 2 fees for the role of bond counsel, which they were not willing to do and should not be required to do as a matter of market requirement.

To the contrary, they should have been allowed to have employed bond counsel who would...."

Record, Volume III, pps. 113-126.

APPENDIX M, Part 2

Excerpt from Fred G. Benton Deposition, February 26, 1986, pps. 183-190

"By Mr. McEntee:

"Q. Mr. Benton, this conspiracy or conspiracies you allege, has the Foley, Judell firm been a party to them from the beginning of the conspiracies, or just since it began doing bond work for the LPFA?

"A. The Foley firm was a victim for a long time. It wasn't until somewhere back in 1984 that Harold Judell apparently decided to work out a merger. We were handling at the time with Harold that Lake Charles Harbor and Terminal thing for L&G Trunk Line, and, as I recall, the McCollister firm was brought into it, and I had a couple of discussions with Harold, and he seemed to be very anxious not to worry about the problem.

"And we were talking about the problem of the inability to work with the LPFA, and he just didn't--he sort of gave me the impression that now, as I look back to the merger, something must have been in the mill then. Just how far that merger goes back, I don't know, but up until the time of the merger, the Judell firm was suffering more loss than anybody in the United States, because they had the greatest coverage at that time.

"I was sitting in the bond commission many times with Bill Beck, and Bill would look at that thing and say, 'Fred, look at this. It used to be that you and I had the whole thing, and now look at this, pages and pages and pages of LPFA.

"And then this merger occurred, and then the cap came along, and then Rolfe and I were together down the street a couple hundred yards, and Rolfe suggested a merger of my firm with his. Now, that occurred about October the 23rd or the 26th.

"It was on the occasion of the dedication of the ground breaking ceremony for the new archive building, and Rolfe's thought was this, that we were all struggling at that time with the cap requirements. And Rolfe said, 'Look, let's join our bond departments, or merge at least the bond departments, and then you'll have access to the LPFA.

"I said, 'Rolfe, I love you, but I don't want to practice with you, and I want to be independent, and I don't think we can do it anyway. I don't think we can talk about it. I don't think it's legal to even plan anything like this, so I don't think we ought it talk any further.

"And so the answer to the question is: Yes, they were the--the Harold Judell--Foley, Judell firm suffered from the monopoly up until the time the merger began to take effect and I think there was a period of time there that Harold knew about the merger, had planned it, was executing it, and from that time on I don't know what he suffered, but I do think he suffered, up until that time, losses of business that his firm would otherwise be in line to obtain.

"Q. So at least up until the time there was the merger, the Foley, Judell firm was not a member of the conspiracy?

"A. That's correct. Now, also, I do not think that, for a long time, the McCollister firm suffered from this. The McCollister firm obviously did not suffer from it as long as Steve Hicks was with the McCollister firm.

"But when he left the McCollister firm and formed his own firm, then there was a period of time-there that the McCollister firm suffered severely, because Fred Chevalier of that firm has talked to me about this, and Fred has told me that he has established and maintains and did maintain up until that time a file outlining a series of transactions in which parties were threatened by Mr. Hicks, if they didn't work with him, they would not be able to work with the LPFA.

"And he said, 'We're either going to have to change over to his form firm or to do something to straighten that bond issue,' that it was handled by the Hicks firm. That's when the Hicks had left McCollister.

"Mr. Chevalier stated that his file outlined many transactions in which major size bond issues which apparently had been directed to them were redirected to the Hicks firm because, in Mr. Chevalier's opinion, Mr. Hicks had somehow or other communicated with the principals of the sponsors and gotten them to bring that file not to the McCollister firm but to the Hicks firm--this is before he merged with Harold Judell--and that this file, which was a major decision on my part that there is evidence out there, goes far beyond my allegations and far beyond anything I think I need to prove to win

this case, because I think that that gets into another whole area of coercion. It gets into the area of underwriters being threatened.

I have other evidence of that type of activity given to me by underwriters themselves to where they say that they have knowledge of threats that, 'If you don't deal with me, you're not going to have any bond issues in Louisiana.'

"Q. So I take it from all that that you also do not believe that the McCollister firm was a conspirator until a point in time when Mr. Hicks--when was it that they became a conspirator?

"A. Well, they were a conspirator when the original deal was set up at the very outset until, and really at no time--in other words, there has been a monopolistic practice by the LPFA ever since its creation.

"For a period of time the McCollister firm suffered from Mr. Hicks leaving the firm and controlling the principal bond issues, and at that time the only thing that the McCollister firm had was house counsel, because Rolfe--I was kidding Rolfe. I said, 'Rolfe, come with me and help break the back of this monopoly. Because I know you've got the evidence. Come with me. You don't have any practice, anyway. You would be a much greater bond lawyer if you would break this monopoly and just take your chances.

"And Fred Chevalier had quite often told me, 'Look, I'd rather, any day, take my chance at a straight opportunity to get bonds than I would this setup.'

"But when I said that to Rolfe, Rolfe said, 'Fred, you don't understand. You don't realize that every time the Hicks firm is named as bond counsel, I am named as house counsel. And I have more than I can do. If I had more lawyers, I believed I could handle more. I have competent, good lawyers to help me handle what I have to do.'

"And I said, 'Well, we just can't. You know, we cannot talk about this, and we cannot merge, and I'm complimented by your willingness to consider me for that, but we can't merge.'

"And this merger thing got John Cox. And back there during the time that we were working on the cap, we had these meetings with the state in which we were protesting the way that this thing was being drawn by a young lawyer there in Harold Judell's office. We were protesting the assignment of all the cap to this exclusive

LPFA, and we thought that John Cox would be very vigorous in joining with us to oppose this, but he wasn't. And Jerry Osborne at that time, at one of these meetings said, 'Well, look. These guys have got the muscle, and they are going to use it.'

"And it wasn't long after that that the Cox firm merged with the Foley firm, and all of these mergers are all part and parcel of the conspiracy that I'm talking about.

"So I'm not going to sit here and have any of my testimony to the effect that the McCollister firm at any time was free of having done something to create a monopoly and to perpetuate it, to allow it to exist. All I can say is that the animal got loose from him part of the time and bit him, and he finally--and I don't think it's--right now, if I had to sit back and say that Rolfe is coming out by far on the shorten end of the deal, but that doesn't alter the fact that he's going along with it, in accepting these appointments as house counsel, because that's the best he can salvage out of it.

"Q. Is it your contention, Mr. Benton, that Mr. Hicks can conspire with his own firm?

"A. I think that Mr. Hicks was conspired with Victor Bussie and that those are the 2 principal people that have controlled this entire very lucrative source of fees.

"Q. That wasn't my question, sir. I said: Is it your contention that he could conspire with his own firm?

"A. Well, what do you mean, with his own firm?

"Q. Well, he's a member of the firm of Foley, Judell. Can he conspire with his own firm? Do you think he could conspire with Harold?

"A. Could they agree?"

Record, Volume III, pps. 183-190.

APPENDIX N

Fred G. Benton, Jr. et al	:	Number: 324,550 Division M
Versus	:	19th Judicial District Court
Parish of EBR, et al	:	Parish of East Baton Rouge
	:	State of Louisiana

Portion of Hearing
Friday, July 27, 1990
Honorable Joseph Keogh, Judge Presiding

Reporter's Note: A portion of hearing on motion for partial new trial, filed on behalf of plaintiffs, and motion for partial new trial, filed on defendants.

Mr. Hardy: "The Clark case, which we cited in our brief involved an action--litigation. In that situation, an attorney was discharged without cost. The matter went to judgment without that attorney. It was dismissed, and the court said this, a litigant can voluntarily dismiss his claim or decide not to appeal the dismissal of his suit. The plaintiff's suit has been dismissd and no fee was due until the plaintiff obtained a favorable judgment. Your Honor, I submit that if a litigant can voluntarily dismiss his suit and thereby deny his attorney a fee, the City Parish can also, for whatever reason. And indeed, I think there was testimony that there was an opportunity to save money. They can, and perhaps have the duty to go in another direction. They can do that. That's an unfortunate consequence for the attorney involved, but that's a risk of bond work. The rewards are superior, the risk are also superior."

The Court: "This is the same issue that went to the Supreme Court?"

Mr. Hardy: "That's correct, Your Honor. But I think in the Clark case--"

The Court: "That's a touchy matter."

Mr. Hardy: "--in the Clark case, Your Honor--"

The Court: "Because that's the--I mean, you know, if you had a microscope and would look at this whole thing, and you got down to the atom of the core of the whole problem, it would be Mr. Benton's opinion visavis that particular issue which the Supreme

Court vindicated and which puts me in a posture of almost having to give him a fee for that. In fact, I ran into Pat Screen in a context of coming in and out of a resturant shortly after I rendered a judgment in that case, and he said, Boy, you really chopped me down there. He said, I hope you didn't make me personally responsible for paying the judgment. I said, no, I didn't do that, Pat. But he should not have rejected Mr. Benton's well-given advice. Visavis that bondage which the Supreme Court vindicated and which formed a basis for him changing bond attorneys. It's kind of like--to me, it's a mistake compounded into a financial disaster for Mr. Benton."

Mr. Hardy: "I would suggest to you--"

The Court: "The i.e. of--if Mr. Benton had sacrificed his professional integrity and said to Mayor Screen what Mayor Screen wanted him to say, Mr. Benton would probably still be bond counsel for the parish. However, Mr. Benton, taking his professional opinion as being sacrosanct, told the Mayor what he didn't want to hear, and so the Mayor fired him and went another route. And then the Supreme Court said Mr. Benton was right all along. I would like to take all the $70,000.00 away from Foley--Breazeare, or whatever it is, and give it to Mr. Benton because they foota-booded the whole system. They conned Mayor Screen into going another way which proved to be wrong. But during the interval they built up enough walls, apparently to take the buisiness away from Mr. Benton, all of which, to this Court is dispicable."

Mr. Hardy: "I would suggest to Your Honor that all of that could well be a consideration in an action involving Foley, Judell."

The Court: "Yes."

Mr. Hardy: "But like in the Clark case, there was no discussion of whether the client was right or was wrong in not pursuing his claim. He had a right to do that, and there were contingenices involved that were unfilled, but I would suggest to Your Honor that that consideration might be a valid consideration--"

The Court: "It's not too late to bring Foley and those folks into this matter."

Mr. Hardy: "That's correct, Your Honor."

The Court: "They could be brought in by third party demand."

APPENDIX O, Part 1

State Times, Thursday, October 8, 1987, page 1A

BOND INDUSTRY GIVES $350,000 TO CAMPAIGNS

By Carl Redman, *State Times* writer

"A number of key Louisiana officials with oversight responsibility for tax-exempt bond programs in the state have received more than $350,000 in campaign help from elements of the bond industry.

"Bond attorneys, securities firms and the people who work for them have pumped at least $357,655 in cash, loans and in-kind contributions into the governor's race and into the campaigns of members of the state Bond Commission, the latest financial disclosure reports show.

* * *

"Among bond interests, bond attorney Steve Hicks and the securities firm of Donaldson Lufkin & Jenrette have pumped the largest amounts of money into Louisiana's fall elections--$62,007 on the part of Hicks and a Hicks-created political action committee and $59,500 on the part of DLJ, according to the most recent campaign finance reports.

"Hicks in a partner in the law firm of Foley, Judell, Beck, Bewley, Martin and Hicks, which serves as bond counsel on most of the major tax-exempt bond issues done in the state.

"Donaldson Lufkin & Jenrette is a securities firm that has taken part in several of the state's most recent bond issues--including a $1.3 billion issue to settle Louisiana's debt to the federal unemployment compensation trust fund and last year's $1.15 billion bond issue to refinance the state debt.

"In addition to a $25,000 loan to the Edwards campaign, Hicks has made thousands of dollars in direct contributions and in-kind services to the campaigns of other Bond Commission members.

"Hicks put up $12,137.15 for a fund-raiser for Nunez in February 1986, and he shelled out another $7,016 to pay for a Burbank fund-raiser this year.

"Hicks also was the driving force behind the creation of two political action committees: the Public Finance Alliance and the Government and Business Alliance.

"The PFA is largely dormant, and most of the $28,500 Hicks put into the PFA has been lent to the Government and Business Alliance.

"In addition to the PFA loan of $25,000, the GBA has been fairly successful in tapping those connected to the bond industry for funds.

"The GBA's latest campaign finance report shows the PAC received $27,500 from Hicks; a total of $8,000 from a number of New Yorkers in the investment industry; $25,000 each from Louisiana National Bank and Ambank, which serve a trustee banks on many bond issues; $20,000 from local attorney Gregory Pletsch, who does work on bond issues handled by the Louisiana Public Facilities Authority; $10,000 from Bowne of Dallas, a bond printing firm; and $7,490 from Frank McGee & Co, an accounting firm that handles LPFA books."

* * *

Record, Volume II, page 300.

APPENDIX O, Part 2

Morning Advocate, Saturday, November 7, 1987, page 7A

Bond industry contributes
At least $437,000 pumped into
1987 election campaigns

By Carl Redman and Greg Garland/*Morning Advocate* writers

* * *

"State campaign finance disclosure reports show the Government and Business Alliance--a political action committee headed by Baton Rouge bond attorney Steve Hicks -- spent $64,475 before the Oct. 24 primary election. In addition to PAC contributions, Hicks himself gave candidates at least $55,000 in cash, loans and in-kind contributions.

After spending $64,475, Hicks' PAC still had at least $206,015 left to spread around for future political activities. Louisiana National Bank, Ambank, the Louisiana AFL-CIO and a number of firms active in the bond industry all pumped money into Hicks' PAC.

"LNB and Ambank frequently serve as trustee banks on bond issues of the Louisiana Public Facilities Authority, and Louisiana AFL-CIO President Victor Bussie is the chairman of the LPFA's board of trustees.

"The LPFA is the one of the nation's top issuers of tax-exempt bonds and Hicks' firm serve as bond counsel on most LPFA bond issues.

* * *

"Hicks' PAC has received major infusions of money from a number of different sources: Hicks himself has put $57,500 in the PAC; his law partner Mark Selvidge has kicked in $30,000; LNB and Ambank, which serve as trustees in many bond issues kicked in $25,000 each; Baton Rouge attorney Gregory Pletsch, who has worked on some bond deals, put up $20,000; bond printer Browne of Dallas put of $10,000; and the Louisiana AFL-CIO put up $28,000.

* * *

"The AFL-CIO gave the money to Hicks' PAC with no strings attached for 'Hicks to give to whoever he wanted,' Bussie said. In most cases, the AFL-CIO is happy with the results, but in a few cases the interests do not coincide -- and Bussie said he has talked to Hicks about it.

"The Government and Business Alliance has spent most of its money so far on the campaigns of Bond Commission members.

* * *

"... And Citipac, the political arms of CitiState Advisors, has put nearly $24,000 into Louisiana elections.

"CitiState advisors is owned by Walter Monsour, a former aide to Mayor-President Pat Screen. ...

"... Citipac has made its largest contributions to members of the State Bond Commission: $2,500 to Brown;...

* * *

"The New Orleans-based firm in which Hicks is a partner -- Foley Judell Beck Bewley Martin and Hicks -- has a hand in most major tax-exempt bond offerings in the state. Hicks said politics have played a part in that success, but were not the primary factor.

* * *

APPENDIX P, Part 1

State Times, Thursday, November 5, 1987, page 6A

LPFA has $10.5 million nest egg built from fees it collected

By Greg Garland and Carl Redman/*State Times* writers

"The Louisiana Public Facilities Authority has amassed nearly $10.5 million in total assets, records show--a nest egg built from the fees it collected from $8.8 billion in bond issues over the years.

"The nest egg still is growing as the LPFA continues to collect more in fees than it spends for its operations. And records show the public trust has not been stingy in what it spends on its operations.

"The LPFA's 1987 operating budget calls for $1.4 million in expenses and $3.8 million in revenue. If that stands up, the authority will put $2.5 million in the bank this year.

"But with the year only half over, the LPFA already has very nearly hit its budget projections for both spending and revenue. The authority's June 30 balance sheet showed the LPFA already posted $3.1 million in revenue and had spent $1.0 million for operations.

"The authority could allow its bank balance to grow even larger if it chose.

"The LPFA has the right to collect an annual fee on outstanding bonds. But since 1980, the LPFA has waived collection of those fees each year, said LPFA bond counsel Steve Hicks.

"The authority has collected those fees only on issues floated to finance multifamily housing--and the fees have been given to another public trust, the Louisiana Housing Finance Agency, to keep it from going to the Legislature for funding, Hicks said.

"LPFA Chairman Victor Bussie said the ballooning bank balance was part of an overall LPFA strategy aimed at keeping the quasigovernmental agency out of the state till.

"The LPFA has used 'not one penny of public money,' and that's the way it always should be, he said.

"Like any other public trust in Louisiana, the LPFA issues tax-exempt bonds that stand on their own, said William Ross, program

administrator for LPFA mortgage bond issues and an architect of the state's public trust laws.

"LPFA bonds are not debts of state government; they have no call on the state treasury for payment, Ross said. An LPFA bond issue stands on the strength of the project it finances and/or credit insurance purchased as part of the bond package, Ross said."

* * *

Record, Volume II, page 293.

APPENDIX P, Part 2

State Times, Thursday, December 14, 1989, page 1A

Agency's high spending for outside consultants questioned
[LPFA has $15.1 in assets.]

By Greg Garland and Carl Redman/*State Times* writers

* * *

"The LPFA--which accrued $15.1 million in assets--cannot spend its money 'for anything other than public purposes,' Bussie said. The LPFA's five-member board decides how to use those resources."

* * *

APPENDIX Q, Part 1

Morning Advocate, Thursday, November 5, 1987, page 11A

LPFA source of income for select few
New Orleans law firm makes $11.8 million
handling 204 bond issues for authority

By Greg Garland and Carl Redman/*State Times* writers

* * *

"The New Orleans-based law firm of Foley Judell Beck Bewley Martin & Hicks has made $11.8 million over the past 3-1/2 years handling 204 LPFA bond issues. Baton Rouge attorney Steve Hicks is in charge of LPFA business for the Foley Judell firm.

"The local firm of McCollister McCleary & Fazio was the LPFA's only other bond counsel during the same period, handling 28 issues and collecting $797,880. It made $946,379 more as "special counsel" on other LPFA bond issues.

* * *

Record, Volume II, page 305.

APPENDIX Q, Part 2

State Times, Wednesday, November 4, 1987, page 1A

Select few make millions on sales
Handling LPFA bond issues
profitable for N.O. law firm

By Greg Garland and Carl Redman/*State Times* writers

"A small, close-knit group of lawyers and consultants selected without any public bid or competition is making millions handling bond issues for the Louisiana Public Facilities Authority.

"One New Orleans-based law firm has made $11.8 million during the past 3-1/2 years handling 204 LPFA bond issues. Baton Rouge attorney Steve Hicks is in charge of the LPFA business for that firm, Foley Judell Beck Bewley Martin & Hicks.

"The local firm of McCollister McCleary & Fazio was the LPFA's only other bond counsel during the same period, handling 28 issues and collecting $797,880. It made $946,379 more as 'special counsel' on other LPFA bond issues.

"State Rep. Kevin Reilly, D-Baton Rouge, who is a past member of the State Bond Commission and longtime critic of LPFA, says the legal fees paid by the LPFA are excessive, even if they do fall within the limits set by the state.

"'This is the greatest rip-off of public funds that I've ever seen, and it appears to be legal,' Reilly said. 'It's legal theft...just highway robbery.'

* * *

"The people who work regularly for the LPFA generally are a close group and most of the key players have office space in the same building as the LPFA at 8555 United Plaza Blvd.

"Monsour, the former top aide to Mayor-President Pat Screen, is one of the key players in the LPFA through CitiState Advisors, which serves as 'program administrator' for 11 LPFA bond issues.

"Monsour's firm has collected $975,259 in fees and expenses from the LPFA since it was formed in May 1986 and began working for the authority....

* * *

"Monsour is Hicks' neighbor.

"The vice-president of CitiState Advisors, Sheldon Strasner, is the son of Stuart Strasner who was involved in putting together the legislation that allowed the LPFA and other authorities to be created.

"Hicks' law partner, Stokes McConnell, is a personal friend of LPFA Executive Director Paul Gravel and steered Gravel to the job as LPFA's executive director after its then-director left in 1985, according to Gravel. Gravel is a distant cousin of Camille Gravel, former executive counsel to Gov. Edwin Edwards.

"Pletsch, who has an office adjacent to Hicks in the Four United Plaza building, is another key player in the LPFA bond business. He serves as the legal counsel to trustee banks used by LPFA--primarily Ambank and Louisiana National Bank.

"Pletsch represents CitiState Advisors, is Monsour's personal tax lawyer and is a member of CitiState's board of directors. Records with the Louisiana secretary of state's office list Monsour and his wife, Mary Ann, as the other directors.

"Financial Consulting Services--which is program administrator on all bond programs of the East Baton Rouge Mortgage Finance Authority--also runs the LPFA's mortgage programs. FCS is headed by William Ross Jr., who was instrumental in creation of public trusts in Louisiana."

* * *

Record, Volume II, page 285.

APPENDIX R, Part 1

Sunday Advocate, February 25, 1990, page 1A

$74 million in LPFA bonds built only big fees

Money banked, no projects constructed

By Steve Culpepper and Mike Dunne, *Advocate* staff writers

"Four of the five largest tax-exempt multi-family housing bond issues created by the Louisiana Public Facilities Authority never resulted in projects being built.

"Instead, the $74 million generated was invested, paying handsome fees to all involved, including LPFA. ...

* * *

"In two of the projects, there are appearances of conflicts of interest involving a Baton Rouge law firm.

"Most of the developers said they have been interviewed by the Internal Revenue Service about the details of the tax-exempt bond issue.

* * *

"In all, six such aborted projects were rushed through LPFA in late 1984 and early 1985 in an effort to beat tax law changes that eventually would make such deals less lucrative. Four projects planned for Baton Rouge were financed in one $41.58 millon bond issue. The other two projects, planned for New Orleans and Slidell, were funded by a single issue of $32.5 million.

APPENDIX R, Part 2

Sunday Advocate, February 25, 1990, page 1A

LPFA bond issues helped worsen rental market

By Mike Dunne, *Advocate* staff writer

"In December 1984, the Louisiana Public Facilities Authority produced seven multi-family housing bond issues and the barrage continued into 1985.

"The seven multi-family issues were part of a $159.52 million frenzy of bond issues cranked out for 42 different construction projects by LPFA and its bond attorneys in December 1984. Between 1981 and the end of 1985, LPFA issued bonds for construction of 61 multi-family apartment complexes around the state.

* * *

"In many cases LPFA's bonds were bought up by a Louisiana bank or savings and loan.

"Many of LPFA's multi-family projects have failed and are now part of the federal government's massive thrift industry bailout bill.

"A case in point is Pontchartrain Oaks, a New Orleans East apartment complex developed by Schenker in 1983 with $13.5 million in LPFA bonds.

"The bonds were bought by Audubon Federal Savings and Loan. According to Schenker's bankruptcy records, that $13.5 million project is now appraised at $4.6 million. Audubon suffered a huge loss on the project. That investment and similar ones resulted in the thrift failing and its subsequent closing by federal regulators."

* * *

APPENDIX R, Part 3

State Times, Tuesday, November 3, 1987, page 1B

Agency borrows $1.3 Billion that remains unused
Attorneys, consultants make
$26.2 million from bond sales

By Greg Garland and Carl Redman/*State Times* writers

* * *

"LPFA records show it borrowed $1.35 billion over 1-1/2 years that has yet to be used for any public purpose, although a select group of lawyers, underwriters and consultants made $26.2 million from the bond sales.

"Besides issuing bonds for programs that haven't work[ed], the LPFA has approved bond issues for far higher amounts than needed. It borrowed $52.9 million in 1985 to provide capital equipment loans to private colleges, for example, but records show only $6.5 million has been used.

"'It's obvious something intended for the public good has been used for private gain,' said State Rep. Charles 'Peppi' Bruneau, R-New Orleans, a longtime critic of the LPFA. 'It's a disgrace. What we ought to do is shut it down and start all over.'"

Record, Volume II, page 281.

APPENDIX R, Part 4

Morning Advocate, Wednesday, November 4, 1987, page 7A

Agency's financing 'pools' often go unused
Attorneys, consultants paid
$26.2 million in fees

By Greg Garland and Carl Redman/*State Times* writers

"...since its first bond issue was floated in 1974, the LPFA has grown to the No. 5 issuer of tax-exempt bonds in the nation.

"Today, with more than $8.8 billion in bond sales behind it, the LPFA has once again come in for criticism....

* * *

"LPFA records show it borrowed $1.35 billion over 1-1/2 years that has yet to be used for any public purpose, although a select group of lawyers, underwriters and consultants made $26.2 million from the bond sales.

"Besides issuing bonds for programs that haven't worked, the LPFA has approved bond issues for far higher amounts than needed....

* * *

Record, Volume II, page 300.

APPENDIX S, Part 1

Morning Advocate, Thursday, November 5, 1987, page 11A

Monsour's firm grosses nearly $1 million in just over a year for LPFA work

By Greg Garland and Carl Redman/*State Times* writers

* * *

"LPFA records show CitiState Advisors has collected $915,070 as the program administrator on 11 LPFA bond issues--jobs it was awarded without competition.

* * *

"LPFA paid CitiState $60,189 for out-of-pocket expenses in addition to the $915,070 fees. What the out-of-pocket expenses consisted of could not be determined because LPFA does not require CitiState Advisors to document them."

* * *

Record, Volume II, page 307.

APPENDIX S, Part 2

State Times, Wednesday, November 4, 1987, page 12A

Former Screen aide makes nearly $1 million handling bonds

By Greg Garland and Carl Redman/*State Times* writers

"In May 1986, Walter Monsour created a company to manage bond programs. Within six months, it had collected fees in the six-figure range from the proceeds of bond issues handled by the Louisiana Public Facilities Authority.

"So far, LPFA records show that Monsour's company, CitiState Advisors Inc., has collected $915,070 as the program administrator on 11 LPFA bond issues--jobs it was awarded without competition.

* * *

"LPFA paid CitiState $60,189 for out-of-pocket expenses in addition to the $915,070 fees. What the out-of-pocket expenses consisted of could not be determined because LPFA does not require CitiState Advisors to document them.

"Monsour declined to make available records of the expenses, saying that was a private business matter and that he preferred to keep it that way. He said CitiState has the same arrangement with out-of-state authorities.

"The company's primary role is to promote use of the LPFA bond programs by helping local governments, school boards and similar entities tap the loan 'pools' the authority creates.

"Monsour, former top aide of Mayor-President Pat Screen, knew most of the key players before he started working with LPFA. He has long traveled in the same political and business circles as LPFA Chairman Victor Bussie, bond counsel Steve Hicks and others.

"The ties go further.

"LPFA executive director Paul Gravel, LPFA board member Tommy Antoon and Hicks' law partner, Stokes McConnell and Monsour were members of Sigma Alpha Epsilon fraternity at LSU. Gravel said they were not all at LSU at the same time.

"Monsour also has business ties to local attorney Greg Pletsch, frequently a legal counsel for LPFA's trustee banks. Pletsch is Monsour's personal tax attorney and is on the board of CitiState Advisors."

* * *

Record, Volume II, page 288.

APPENDIX S, Part 3

State Times, December 14, 1989, page 1A

Agency's high spending for outside consultants questioned

[$15.1 million assets]

By Greg Garland/*State Times* writer

"The Louisiana Public Facilities Authority has paid consultants $865,296 during the past two years for marketing, public relations, lobbying and economic development assistance, the agency's records show.

* * *

"'This deeply concerns me and I would like an explanation,' Commissioner of Administration Dennis Stine said when asked about the money spent on consultants. 'We're going to review it.'

"Stine and Roemer's executive secretary, Steve Cochran, said they had not been aware of the consulting contracts. ...

* * *

"Cochran added, 'The core of the problem is that they were created as an entity that lies outside of any meaningful oversight. What you're seeing is the effect of that problem'

* * *

"The LPFA -- which has accrued $15.1 million in assets -- cannot spend its money 'for anything other than public purposes,' Bussie said. The LPFA's five-member board decides how to use those resources.

* * *

"The six consultants who collected $856,296 from the Louisiana Public Facilities Authority over the past two years say they gave LPFA its money's worth, providing services spelled out in their contracts.

* * *

"There was some confusion about why Mayeaux, who was paid $92,000 from March 1988 through October 1989, was hired by LPFA and about the work she is doing for the agency.

* * *

"When initially asked about Mayeaux's duties, LPFA Managing Director Billy Gordon said she did 'political lobbying' for LPFA. The LPFA's original contract with Contract Marketing lists 'governmental relations' as part of its job.

"Asked why the LPFA needs a lobbyist, Gordon responded, 'Because people like (state Rep.) Peppi Bruneau introduce legislation every year to beat us to death. We need somebody to track it and Donna does an excellent job of it.'

"Mayeaux, however, said she does no political lobbying for LPFA.

"'I don't do lobbying,' Mayeaux said. However, she said she has 'worked with them on legislative strategy' and advised the LPFA on preparing materials for legislators to explain the agency's programs.

* * *

APPENDIX T, Part 1

State Times, Thursday, November 5, 1987, page 1A

Offices of LPFA plush, expense accounts liberal

Thousands spent each year on
travel and entertainment

By Greg Garland and Carl Redman/*State Times* writers

"With nearly $9 million in the bank, trustees and staff of the Louisiana Public Facilities Authority maintain a first-class operation--from plush offices to high-priced business lunches and liberal travel allowances.

"When trustees and staff travel, they stay at expensive hotels, eat in fancy restaurants and entertain liberally at LPFA expense. The costs are picked up from bonds issued to finance projects and programs that are supposed to benefit the public.

"Under a broad heading of 'business development,' officials with the LPFA spend thousands of dollars each year on 'perks' that are as generous as those associated with top-of-the-line business enterprises.

"Key LPFA staffers have credit cards backed by the authority which they use to charge meals and other expenses. They frequently use those credit cards to entertain people whose firms work with the authority on bond issues.

* * *

"The $300 per diems can add up to a lot of money--the per diem payments to Alexandria attorney Thomas Antoon are a case in point....

"Records show Antoon has drawn $191,400 in per diem payments since 1981. And that doesn't include thousands more that he was reimbursed for hotels, mileage and meals while conducting LPFA business.

"On at least one occasion, Antoon claimed his $300 per diem for simply signing documents mailed to his law office in Alexandria, records show....

"Another LPFA board member, C.C. 'Chuck' Dabadie, once claimed his $300 per diem for attending a 'reception' hosted by two LPFA consultants. He refused to comment, referring questions to Bussie.

* * *

"--In December 1985, the LPFA spent $1,421 sending floral arrangements to board members and a number of agencies that play key roles in LPFA bond offerings, including two banks, bond counsels, the Louisiana Senate staff office and the state Bond Commission. The bill from Billeann's Flowers also included $265 for floral arrangements for the LPFA office and $100 floral arrangements for each board member.

* * *

"--Last October, office manager Lynda Rowley charged $106 to purchase a briefcase as a going-away gift from the staff to LPFA accountant Yvonne Lemoine, who Gravel said was a four-year LPFA employee.

"Bussie said many businesses give going-away gifts to departing employees and the LPFA is 'to some extent a private enterprise.'

* * *

Record, Volume II, page 290.

APPENDIX T, Part 2

Morning Advocate, Friday, November 6, 1987, page 1B

LPFA officials spend thousands on 'perks'

By and Carl Redman and Greg Garland

* * *

"The Louisiana Public Facilities Authority has built its bank accounts to nearly $9 million over the last 13 years, and along the way its trustees and staff have developed an upscale business style.

"Under a broad heading of 'business development,' officials with the LPFA spend thousands of dollars each year on 'perks' that are as generous as those associated with top-of-the-line business enterprises.

"Key LPFA staffers have authority-backed credit cards they use to charge meals and other expenses. They frequently use those credit cards to entertain people whose firms work with the authority on bond issues.

"When trustees and staff travel, they stay at expensive hotels, eat in fancy restaurants and entertain liberally at LPFA expense. The costs are picked up from bonds issued to finance projects and programs that are supposed to benefit the public."

Record, Volume II, page 309.

APPENDIX U, Part 1

State Times, Thursday, November 5, 1987, page 6A

LPFA's Four United Plaza--the building that bonds built

By Greg Garland and Carl Redman/*State Times* writers

* * *

"Four United Plaza is home of the nation's fifth largest issuer of tax-exempt bonds--the Louisiana Public Facilities Authority. It also houses the Baton Rouge law offices of Foley Judell Beck Bewley Martin and Hicks, ranked No. 6 in the nation for the dollar amount of bond issues handled so far this year.

* * *

"Hicks is part owner of Four United Plaza, the building that houses the LPFA. The LPFA pays $176,171 a year in rent. Two years ago, it got by with half the space it has now and paid rent of $50,409 at One American Place.

"Four United Plaza was constructed using $7 million in tax exempt bonds issued by the LPFA. Hicks and two law partners, Stokes McConnell and Mark Selvidge, own 25 percent of the building at 8555 United Plaza Blvd.

* * *

"The LPFA itself pays $20,000-a-month in office expenses for a North Carolina-based consultant that is a tenant. LPFA asked Wachovia Services to establish a local office to service student loans and agreed to pay the expenses.

* * *

"Bussie said he was aware of Hicks's financial interest in the building at the time the lease was signed but said it had nothing to do with the decision to move there.

* * *

"The building has become a mecca for firms in the bond business. In addition to the LPFA and the Baton Rouge offices of Foley Judell, the building also houses the trust offices of LNB and Ambank.

"The New Orleans-based investment banking firm of Howard Weil Labouisse Friedrichs is another tenant, with offices on the first floor down the hall from the LPFA. It also works with the LPFA.

"Three consulting firms who do work for the LPFA are there--CitiState Advisors, Wachovia Services and Financial Consulting Services. The law firms of Gregory Pletsch and Associates and Gary, Field, Landry and Dornier also are located in the building.

"Pletsch represents LNB and Ambank when they are selected as the trustee banks for LPFA bond issues. Gary, Field, Landry and Dornier is representing the LPFA in other legal matters."

Record, Volume II, page 292.

APPENDIX U, Part 2

State Times, Wednesday, November 4, 1987, page 12A

Premier bond counsel to LPFA regarded as 'hardball player'

By Greg Garland and Carl Redman/*State Times* writers

* * *

"Hicks really got started on his rise to power when he was still at the LSU law school in 1973. He was a senior when he participated in the delivery of his first bond issue, for a hospital construction project.

"The then-powerful leader of the Louisiana Senate, Michael O'Keefe, took Hicks under his wing the following year. Hicks, by then an attorney, drafted the legal documents setting up the LPFA in 1974.

"O'Keefe pushed for the LPFA's creation, as did Victor Bussie, the powerful head of the Louisiana AFL-CIO. Gov. Edwin Edwards created the LPFA by executive order in late summer.

"O'Keefe defended the LPFA when it came under attack and nurtured it through its early years. Bussie ended up on the LPFA's first board of directors along with a key Edwards adviser, Camille Gravel.

"O'Keefe--found guilty of obstruction of justice and mail fraud in connection with a business deal--no longer is in the Senate.

"Early on, Bussie and Hicks developed the close relationship they still maintain. Indeed, it has been said that Bussie looks at Hicks as a son.

"'He's too short to by my son,' Bussie joked. 'But my respect has developed for him over the years. Actually, I think my relationship with Steve is better than it is between most fathers and sons.'

"Hicks feels likewise.

"'I consider him (Bussie) to be my closest personal friend,' Hicks said. 'I can't think of another man I have more respect for than Vic Bussie. I have total respect for him.'"

Record, Volume II, page 287.

APPENDIX V

Sunday Advocate, Sunday, June 24, 1990, page 1A

Drexel's junk-bond web touches Louisiana

By Steve Culpepper and Mukul Verma/Advocate staff writers

* * *

"The Louisiana Housing Finance Agency issued $150 million worth of taxable bonds in July 1986. The Louisiana Agricultural Finance Authority issued $300 million worth of taxable bonds in September 1986. Both issues mature in 1996.

* * *

"The bonds' value has dropped dramatically because money from the sale of the bonds was invested with a California insurance company--Executive Life Insurance Co.--which, in turn, invested its money in high-risk junk bonds through Drexel Burnham Lambert Inc. The junk-bond market has collapsed; Drexel Burnham is bankrupt; Executive Life's investments are today worth much less, and the Louisiana bonds, consequently, are considered riskier investment and now have a much lower value in the financial marketplace.

* * *

"But because of the financial market's perception of the bonds' worth, LAFA's and LHFA's bonds now sell for little as 50 cents on the dollar, state Treasurer Mary Landrieu said.

* * *

"When LAFA issued its $300 million in bonds in September 1986 it picked Drexel Burnham and Howard Weil as underwriters and Foley Judell Beck Bewley Martin & Hicks as bond attorneys.

"That same year, Agriculture Commissioner Bob Odom, who also is chairman of LAFA, received $22,000 in campaign contributions from Howard Weil, from some officers and employees of Howard Weil and from several partners of Foley Judell. It was not an election year.

"Previously, the most Odom had received from contributors in these firms in a single year was $13,833 which occurred in 1984. Many of these same contributors donated $10,000 to him in 1983 and $2,000 to him in 1985."

* * *

APPENDIX W, Part 1

Morning Advocate, Monday, February 26, 1990, page 1A

Local lawyers stood to gain fees, sell property

By Steve Culpepper and Mike Dunne/*Advocate* staff writers

"Two members of the law firm chosen as bond counsel for the Louisiana Public Facilities Authority in December 1984 stood to gain more than just fees from a $41.58 million bond issue.

"Each man was part owner of different property that each tried to sell to developers applying for financing from the $41.58 million in bond proceeds.

"Frank Lassiter said bond attorney Fred Kroenke told him his $2.3 million apartment project, Village Kijiji, was simply too small for the LPFA to fool with. But it just so happened Kroenke knew of some property down the street from Lassiter's planned apartment complex that would allow Lassiter to expand his project, Lssiter says. That purchase would make it suitable for LPFA financing, Lassiter says Kroenke explained to him.

"Lassiter later learned that LPFA routinely approved issues of much less than $2.3 million. Lassiter learned something else later, too. When handed the purchase agreement a month before the bond closing, Lassiter discovered that the 8.75 acres of land Kroenke had arranged for him to buy for $421,000 was owned by Kroenke and his family.

"Across town, bond attorney Rolfe McCollister Sr.'s real estate agent had long been seeking a buyer for Plaza Americana, a piece of property owned in part by McCollister. McCollister was a partner in the firm of McCollister McCleary Fazio and Holliday; Kroenke also was an attorney in that now-defunct firm.

"When Texas developer John Preston came to Baton Rouge he hired a real estate agent to find a suitable location for his apartment project. The agent, Carl Blyskal, was the same man who represented the owners of Plaza Americana. After meeting McCollister and striking a tentative deal on Plaza Americana, Preston figured he'd also found financing for his project, because McCollister's firm steered him to the LPFA and multi-family housing financing."

* * *

APPENDIX W, Part 2

Sunday Advocate, February 25, 1990, page 14A

Money banked no projects constructed

By Mike Dunne, *Advocate* staff writer

* * *

"Monte Sano Oaks Partnership approached LPFA with a $2.3 million apartment project but was told by McCollister McCleary Fazio & Holliday bond attorney Fred Kroenke that his project was too small. Kroenke said the project should be expanded and told developer Frank Lassiter he knew of a good deal on some nearby land, Lassiter said.

"As Lassiter later learned, the land actually belonged to Kroenke and his relatives. The size of his project tripled to $9.6 million.

"Kroenke acknowledged ownership of the land but denied Lassiter's contention that the land was necessary for LPFA bond financing.

"In two other cases, land for the projects was never purchased, although in one of those deals, the targeted property belonged to a partnership in which bond attorney Rolfe McCollister Sr. held a 35 percent interest.

"McCollister's firm also was paid $198,890 out of the bond proceeds for its work as bond counsel on the $41.58 million issue."

* * *

APPENDIX X

State Times, Tuesday, October 31, 1989

State bond refinancing plan killed

Alternative cited for bigger savings

By Greg Garland/Capitol News Bureau

"A proposed bond refinancing deal to save Louisiana employers $345 million in unemployment costs has been scratched in favor of another plan officials say will generate even more savings for employers.

* * *

"The Louisiana Public Facilities Authority had proposed a refinancing plan that involved paying off the $1.3 billion bond issue and issuing $695 million in new bonds. It proved controversial from the start, however.

"The proposed refinancing originally carried $9.8 million in fees for lawyers, underwriters and others. The fees, which Stine and State Treasurer Mary Landrieu criticized as too steep, were cut at the insistence of state officials.

"Landrieu questioned whether it was even necessary to issue new bonds and urged the State Bond Commission to defer action on the LPFA's proposal until Jones could research the issue."

APPENDIX Y, Part 1

Morning Advocate, Tuesday, December 5, 1989, page 16A

Landrieu says state should oversee LPFA

Capital news bureau

"The Louisiana Public Facilities Authority is 'far too independent from state government' and needs to be brought more under the control of state officials, State Treasurer Mary Landrieu said Monday."

* * *

APPENDIX Y, Part 2

State Times, Thursday, December 14, 1989, page 1A

Agency's high spending for outside consultants questioned

[Comments by Governor's Executive Secretary
and Commissioner of Administration]

By Greg Garland/Capitol News Bureau

* * *

"'This deeply concerns me and I would like an explanation,' Commission of Administration Dennis Stine said when asked about the money spent on consultants. 'We're going to review it.'

* * *

"[Steve] Cochran [,Roemer's executive secretary] added, 'The core of the problem is that they were created as an entity that lies outside of any meaningful oversight. What you're seeing is the effect of that problem.'

* * *

"'I don't want to impugn anyone, but I'm very concerned about their (LPFA's) ability to carte blanche spend dollars,' Stine said.

"Cochran said the Roemer administration attempted to deal with that issue in the past by supporting legislation to 'change the makeup of the LPFA so the public would have more oversight.'

"But, he said, that effort was unsuccessful."

* * *

APPENDIX Z, Part 1

State of Louisiana's "Request for proposal for Bond Counsel Services" for Phase I of a financing program authorized by the Louisiana Transportation Trust Fund (TTF) and Transportation Infrastructure Model for Economic Development (TIME).

"November 10, 1989

REQUEST FOR PROPOSAL FOR BOND COUNSEL SERVICES

On October 7, 1989, the voters of the State of Louisiana passed a general referendum ratifying the Louisiana Transportation Trust Fund (TTF) and Transportation Infrastructure Model for Economic Development (TIME), which were created by the First Extraordinary Session of the State Legislature in the form of Act 16, as amended. (Please see attached.)

Act 16 authorizes a total of $1.4 billion of projects to be financed under this program. For Phase I of the financing program the State anticipates issuing three series of revenue bonds secured by a dedicated pledge of 4 cents per gallon of motor fuels tax. The initial financing is scheduled to take place in early February, 1990. The State anticipates issuing initially approximately $200 million, followed by two issues of similar size over the next three years.

The State of Louisiana by this Request for Proposal is seeking to hire bond counsel for Phase I of the above referenced transportation financing program. All firms interested in responding to this request should submit eight (8) copies of their proposal to:

Commissioner Dennis Stine
Division of Administration
Capitol Annex Building, 2nd Floor
P.O. Box 94095
Baton Rouge, Louisiana 70804-9095

Proposals must be received no later than 3 P.M., Central Standard Time, on Monday, November 27, 1989. Any questions regarding this Request for Proposal must be addressed in writing to Ms. Cheryl E. Jones, Discount Corporation of New York Municipals,

Financial Advisor to the State Bond Commission, at 58 Pine Street, New York, New York 10005, FAX (212) 943-3044.

Please answer all questions in the order presented. Initiate each response by restating the question. Start each respective answer on a new page, and paginate your proposal. Please limit the total number of written pages (exclusive of printed promotional material or reports) to thirty (30) pages. Those proposals which do not follow this format will be disqualified.

All respondents must be listed in The Bond Buyer's Directory of Municipal Bond Dealers of the United States, 1989 Fall Edition.

The State may request oral presentations from certain firms on Thursday, November 30, 1989. In any event, the State expects to make a decision selecting bond counsel for this program by December 1, 1989.

APPENDIX Z, Part 2

Excerpt from State Bond Commission meeting of October 19, 1989

"Re: Message from Governor Buddy Roemer presented by Mr. P.J. Mills, Executive Counsel to the Governor

"Madam Chairman, and members of the Bond Commission, the Governor asked me to deliver a brief statement to you with regard to the subject which we so ably handled. Senator Luaricella, you and your committee did an outstanding job in negotiating down the cost of this bond issue and you are to be congratulated. The Governor is asking that the Bond Commission consider either legislation or administrative rules of the Commission which would require that all bond issues coming before the Bond Commission for approval, that there will have been an RFP issued for selection of Bond Counsel, Underwriter's Counsel as well as other professional services related to the issue.

"On those issues which require development of a unique financing arrangement as did the Recovery District financing and Unemployment Compensation issue, it's understood that negotiated fees may certainly be in order to protect the professional work product of the counsel involved. However, greater attention needs to be given to minimizing fees related to bond issues in Louisiana. No intention is given by the Governor to impair the earnings of professional consultants but to urge that the Bond Commission take steps to keep such fees as low as possible. The Governor wishes that those providing professional services to the State of Louisiana and to its subdivisions issuing debt be adequately compensated for their services as it relates to cost involved in particular issues. It's the Governor's concern that too often the fees charged are too excessive in relation to the cost related to the particular services rendered. Profits for services are certainly acceptable, excessive profits, from services to public agencies are not, and the Governor urges serious consideration be given by the Bond Commission to policy [in] this regard.

"Thank you."

Supreme Court, U.S.
FILED
DEC 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 90-582

In The Supreme Court Of The United States

October Term, 1990

BENTON, BENTON & BENTON,
A Professional Law Corporation,

Petitioner,

v.

LOUISIANA PUBLIC FACILITIES AUTHORITY,
STEVE E. HICKS, FOLEY, JUDELL, BECK,
BEWLEY, MARTIN & HICKS, and
MCCOLLISTER, MCCLEARY, FAZIO & HOLLIDAY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT LOUISIANA PUBLIC FACILITIES AUTHORITY IN OPPOSITION

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Louisiana Public Facilities Authority

* Counsel of Record

QUESTIONS PRESENTED

1. Whether the authority of the Louisiana Public Facilities Authority ("LPFA") to select bond counsel for bonds to be issued by the LPFA derives from the State of Louisiana's "clearly articulated" and "affirmatively expressed" policy to displace competition, as those terms are defined by this Court's decision in *Town of Hallie v. City of Eau Claire.*

2. Whether the LPFA, as a state created public trust, qualifies for state action immunity from the federal antitrust laws without a showing of active supervision under the rationale of this Court's decision in *Town of Hallie v. City of Eau Claire.*

3. Whether state action immunity applies to private parties selected by the LPFA as bond counsel where the antitrust causes of action arise out of the LPFA's selection of those private parties as bond counsel.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
I. The Structure of the LPFA	3
II. The Proceedings Below	6
III. The Decisions Below	8
Reasons for Denying the Writ	9
I. The Enabling Legislation Governing the LPFA Meets the Standard Set in *Town of Hallie*, for a Finding of a "Clearly Articulated and Affirmatively Expressed" Policy to Displace Competition	9
II. The District Court Correctly Determined That the LPFA Need Not Show Active Supervision to Qualify for State Action Immunity	14
III. A Conspiracy Exception to *Parker* Immunity is Fundamentally Inconsistent With the Rationale For the State Action Doctrine	17
Conclusion	24

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Cases **Page**

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New Haven Inclusion Cases, 399 U.S. 392 (1970)	2
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Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127 (4th Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S. Ct. 3211 (1990)	3,17,18,19,23
Paragould Cablevision, Inc. v. City of Paragould, Arkansas, 739 F. Supp. 1314 (E.D. Ark. 1990)	21
Parker v. Brown, 317 U.S. 341 (1943)	Passim
Poretto v. United States, 196 F.2d 392 (5th Cir. 1952)	2
Riverview Inv., Inc., v. Ottawa Community Improvement Corp., 899 F.2d 474 (6th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 151 (1990)	16
Scott v. City of Sioux City, Iowa, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985)	19
Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985)	11,12,20
Springs Ambulance Serv. v. City of Rancho Mirage, 745 F.2d 1270 (9th Cir. 1984)	12

TABLE OF AUTHORITIES — (Continued)

Cases **Page**

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) ..... Passim

Westborough Mall, Inc. v. City of Cape Girardeau, Missouri, 693 F.2d 733 (8th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983) 18,19,20

Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated,* 435 U.S. 992, *reinstated,* 576 F.2d 696 (5th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979) 18

Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481 (1986) 2

Statutes

Louisiana Public Trust Act, La. Rev. Stat. Ann. §§ 9:2341-9:2347 (West 1989 Supp.) ..... Passim

Sherman Act, 15 U.S.C. §1 *et seq.* (1988) ..... Passim

NO. 90-582

In The Supreme Court Of The United States

October Term, 1990

BENTON, BENTON & BENTON,
A Professional Law Corporation,

Petitioner,

v.

LOUISIANA PUBLIC FACILITIES AUTHORITY,
STEVE E. HICKS, FOLEY, JUDELL, BECK,
BEWLEY, MARTIN & HICKS, and
MCCOLLISTER, MCCLEARY, FAZIO & HOLLIDAY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT LOUISIANA PUBLIC FACILITIES AUTHORITY IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the selection of bond counsel[1] by the Louisiana Public Facilities Authority ("LPFA"). Petitioner, Benton, Benton & Benton (the "Benton Firm"), asserts an

[1] Bond counsel plays an important role in the issuance of tax exempt bonds. Bond counsel assists the issuer in the proceedings incidental to the authorization, issuance, sale and delivery of the bonds to underwriters or private investors. Bond counsel also furnishes an opinion as to the legality of the issuance, the security and the tax-exempt status of the bonds. (Record at 9 ¶ 24.) Securing the opinion of independent bond counsel is a crucial step in the process of completing a successful sale of the bonds. Accordingly, the issuer of the bonds has a strong interest in ensuring that bond counsel's opinions are widely accepted by the marketplace.

antitrust conspiracy between the LPFA and the attorneys selected as LPFA bond counsel to exclude all other attorneys from serving as bond counsel on LPFA bond issuances. The only "evidence" of that alleged conspiracy is the fact that the Benton Firm has never been selected as LPFA bond counsel. In a second count, the bond counsel actually selected by the LPFA are accused of monopolizing the market of acting as bond counsel to the LPFA.

The courts below closely examined the creation and structure of the LPFA. Based upon that factual examination and a careful application of this Court's precedents following *Parker v. Brown*, 317 U.S. 341 (1943), the courts below concluded that the LPFA is a state agency empowered by the State of Louisiana to select bond counsel. As a result, the courts below held that the principle of state action immunity barred the Benton Firm's causes of action.

In seeking to overturn the decisions below, the Benton Firm cannot demonstrate any of the traditional grounds justifying a *writ of certiorari* pursuant to Sup. Ct. R. 10. The decisions below are neither novel nor in conflict with the decisions of this Court or any other Court of Appeals. Rather than attempt to meet these standards, Petitioner relies extensively on matters extraneous to the record, a reliance that Petitioner concedes is improper. Petition at 29 n.53. The Benton Firm attempts to turn selective quotations from various newspaper clippings and unsubstantiated statements of "fact" into a justification to overturn the decisions of the courts below.[2] Though ample time was allowed, the record

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[2] Petitioner's attempt to rely upon extra-record newspaper articles to support its request for a *writ of certiorari* is clearly improper. On more than one occasion, this Court has refused to consider newspaper articles that are not part of the record. *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 486 n.3 (1986). The remaining newspaper articles cited by Petitioner, although part of the record, were properly disregarded by the lower courts as inadmissible hearsay. *Poretto v. United States*, 196

reflects little, if any, effort by Petitioner to pursue discovery. The record also reflects that the decisions of the courts below were well founded both factually and legally. There is no reason to reconsider Petitioner's claims.

Petitioner's reliance on the pending appeal in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S. Ct. 3211 (1990), fails to provide any alternative support for granting a *writ of certiorari* in this case. *Omni* involves a very different factual situation in which the Fourth Circuit created a novel exception to the state action doctrine for private conspiracies. Given the inherent differences between the facts in *Omni* and those in this case, the decision in *Omni* has no application here. The LPFA believes, moreover, that the decision in *Omni* is inconsistent with this Court's prior decisions and should be reversed.

I. The Structure of the LPFA.

The LPFA was created in 1974 pursuant to the Louisiana Public Trust Act (the "Act"), La. Rev. Stat. Ann. §§ 9:2341-9:2347 (West 1989 Supp.), to facilitate the issuance of conduit municipal bonds in the State of Louisiana. The District Court found that the LPFA, as a public trust, may act only for

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F.2d 392, 395 (5th Cir. 1952); see Fed. R. Civ. P. 56(e). Thus Appendices N, O, P, Q, R, S, T, U, V, W, X, Y and Z, and the portions of Petitioner's brief that purport to rely on those articles, should be ignored by the Court. There is no admissible evidence of a conspiracy, or indeed any other fact alleged by Petitioner in support of its claims. Petitioner forwent its opportunity to conduct discovery; this Court should not be persuaded to offer Petitioner a renewed opportunity to garner evidence in support of its claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("no serious claim can be made that Respondent was in any sense "railroaded" by a premature motion for summary judgment" when judgment was granted after the case had been pending for two years.)

authorized public functions or purposes of the State of Louisiana. *Benton, Benton & Benton v. Louisiana Pub. Facilities Auth.*, 897 F.2d 198, 200 n. 1 (5th Cir. 1990); § 9:2341(B).[3] In fact, the State of Louisiana is the beneficiary of the trust created by the LPFA.

The Act requires extensive oversight of public trusts such as the LPFA by the executive and legislative branches of the Louisiana government. For example, creation of a public trust requires express approval of the governor and two-thirds of the elected members of each house of the legislature. § 9:2341(A). The Act compels each trust to enact by-laws, over which the governor retains a veto power. § 9:2341(C). The trustees of a public trust are appointed by the governor and are "public officers" within the executive branch of the Louisiana state government. § 9:2343; La. Rev. Stat. Ann. § 36:6 (West 1986).

In addition, the District Court expressly found:

> As we have seen, under § 2341 D, the Authority is a public trust and public corporation of the state. It is authorized to provide funding for "any authorized public function or purpose of the state." Every trustee is subject to the provisions of the law on public payroll fraud and public contract fraud and is required to take the oath of office required of public officials. § 2343 A. Meetings of the trustees are required to be open to the public and records are required to be public records and all contracts for construction, labor, equipment, material

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[3] Throughout its petition, the Benton Firm exhibited a gross disregard for the lower courts' conclusions and the facts established in the record. Beginning with its opening paragraph, the petition divorces itself from reality by stating as "fact" that the LPFA had an "arrangement" with the Respondent law firms and that the LPFA exists "for the benefit of private commercial borrowers." (Petition at 2). The allegation of an agreement in restraint of trade is vigorously denied by Respondents and is inconsistent with the District Court's opinion. The contention that the LPFA exists for the benefit of private borrowers is flatly contradicted by the enabling legislation and the findings of the District Court.

> or repairs must be awarded according to the state's public bid laws. § 2343 D and E. Trustees may be removed from office for malfeasance. § 2343 F(2). All public trusts are subject to the supervision of the legislative auditor of the state to the same extent as the public beneficiaries and such trusts are audited on an annual basis by the legislative auditor. § 2346. All bond issues must be submitted to and approved by the state bond commission and attorneys fees incurred in connection with the issuance of bonds shall be subject to approval of the attorney general. § 2347 H and K.

897 F.2d at 203.[4]

Additional limitations on the authority of a Louisiana public trust, such as the LPFA, are contained in an indenture of trust. The indenture, which defines the mode of operation of the trust, constitutes a binding contract between the state and the trust after it is accepted by the governor and two-thirds of the legislature. § 9:2342(A). Amendments to the indenture of trust require the approval of the executive and legislative branches of the state. § 9:2342(B).

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[4] These conclusions of the District Court, based on the LPFA's enabling legislation, are plainly contradictory to the Benton Firm's suggestion that the governor's power to appoint trustees is "nominal" or that the LPFA is "autonomous" and "insulated" from review. (Petition at 3). The Benton Firm's rhetoric may be intended to suggest that the state has imperfectly exercised its powers of appointment and supervision. That argument, however, even if it had some factual support, has no bearing on the question of whether *Parker* immunity is available. *See New England Motor Rate Bureau, Inc. v. Federal Trade Comm'n,* 908 F.2d 1064, 1071 (1st Cir. 1990) (so long as the statutory system for oversight is in place, the state action doctrine will not become a vehicle "for federal oversight of state officials," merely because the state exercises its powers infrequently.); *cf. Boone v. Redevelopment Agency of San Jose,* 841 F.2d 886, 891 (9th Cir.), *cert. denied,* ___ U.S. ___, 109 S. Ct. 489 (1988).

Article VII of the LPFA's Indenture of Trust sets out the powers of the LPFA's trustees. Record at 216-241. The Indenture expressly permits the LPFA to "*appoint* and compensate attorneys . . . in connection with the issuance of any such bonds, notes, evidences of indebtedness or other obligations of the Authority." Art. 7.1(d)(iii) (emphasis added); Record at 232.[5] The Indenture further grants the Trustees the power to "contract for the furnishing of any services or the performance of any duties that they may deem necessary or proper, and pay for them as they see fit." Art. 7.1(o); Record at 235. Section VII concludes: "The Trustees are hereby empowered and authorized to do all things provided for by Article III hereof [the Statement of Purposes] whether hereinabove specifically enumerated or not." § 7.1(t); Record at 236.

II. The Proceedings Below.

Petitioner brought an antitrust action against the LPFA arising out of its selection of bond counsel. The Benton Firm alleged that the mere facts of the LPFA's employment of the Respondent law firms and the LPFA's failure to hire Petitioner constituted prima facie evidence of an agreement to exclude Petitioner from serving as bond counsel in connection with LPFA bond offerings. The Respondents each denied the existence of any agreement, much less an anticompetitive agreement. Indeed, the LPFA has consistently maintained that it selects its bond counsel on a transaction-by-transaction basis.

During the two years prior to Respondents' motions, only one deposition was sought; the Respondents took the deposition of

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[5] The Indenture grants the LPFA broad authority to employ and retain bond counsel; it also specifically empowers LPFA Trustees to employ attorneys "as may be deemed necessary in the discretion of the Trustees to properly operate the business of the Authority, and [to] fix their duties, terms of employment and compensation." Art. 6.18; Record at 230.

Mr. Fred Benton, the principal of the Benton Firm. The Petitioner made two document requests of the Respondents. The Benton Firm never sought any additional discovery. After the deposition of Mr. Benton, the Respondents filed separate motions for summary judgment seeking dismissal of the lawsuit on two grounds: (1) that the LPFA's choice of an attorney to serve as bond counsel could not form the basis of an antitrust claim; and (2) even if it could, the Respondents' conduct was immune from antitrust challenge because the LPFA's selection of bond counsel constituted state action not subject to the Sherman Act.

In its pleadings, the Benton Firm admitted that bond counsel, in the sense of the counsel selected by the LPFA, must be independent of the interested parties to the transaction, and that bond counsel's clients are the purchasing public. Original Brief of Appellant at 4-5. On deposition, Mr. Benton acknowledged that the choice of bond counsel rests with the LPFA and not with project sponsors. He admitted that project sponsors should not have the right to select bond counsel because "the issuing authority has that right."[6] Record at 376. Mr. Benton acknowledged that the LPFA has an interest in who serves as bond counsel and that the LPFA "certainly" has the right to avoid choosing incompetent bond counsel. Record at 373, 375. He admitted, moreover, that it is important for bond counsel to have a good working relationship with the issuing authority and that every LPFA trustee has a duty to base the selection of bond counsel on performance. Record at 375.[7]

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[6] Project sponsors have an inherent bias to see that the bonds are issued at all costs; without the funds from the sale of bonds, the project cannot proceed. Hence, bond counsel that owed allegiance to project sponsors would face serious conflicts of interest.

[7] Petitioner boldly, but erroneously, asserts in its petition that the "LPFA has refused to allow petitioner . . . to serve as bond counsel" and that the Respondent lawyers have "induced the LPFA . . . to coerce project sponsors . . . to discharge petitioner." Petition at 5. No record

The litany of "examples of non-competitive conduct" provided in the Petition at 6-8 are an accumulation of primarily post-record allegations that depend solely upon inadmissible hearsay. The antitrust significance of that conduct is unclear from Petitioner's argument. Indeed, the only item in the list with potential antitrust overtones, the alleged charging of higher than competitive fees for bond counsel, is a non-issue because the Attorney General must review and approve LPFA bond counsel fees. § 9:2347(K).

III. The Decisions Below.

On November 8, 1988, the District Court granted the Respondents' motions for summary judgment and dismissed the lawsuit. In addition to the specific findings referenced above, the District Court specifically found:

> Here the selection of counsel is clearly made by the Authority, the public agency. The private parties, the lawyers, are simply selected to perform legal services for and on behalf of the public agency. The state legislature clearly authorized the Authority to employ bond counsel in connection with the issuance of bonds and placed no restrictions upon the Authority in that connection, except that the attorney general must approve the fee.

897 F.2d at 204. Furthermore the Court concluded as a matter of law that "the Authority is a state agency and, as such, active state supervision of its activities is not required." 897 F.2d at 203.[8]

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cites are offered, however, for these accusations, because none exist. Rather, the record reflects that all the LPFA has *ever* done is to select unilaterally its bond counsel. Project sponsors remain free to engage their own counsel, at their own expense, to perform any services the project sponsor requests.

[8] Contrary to the statement in the Petition at Footnote 2, the District Court did not hold that the existence of special LPFA counsel, in addition to bond counsel, foreclosed the LPFA's comparison of this case to those in which the inclusion of lender attorney's fees in the cost

On March 30, 1990, the Court of Appeals for the Fifth Circuit unanimously affirmed the decision of the District Court, stating simply:

> After careful review of the record, we find that the district court properly and thoroughly analyzed this issue. Hence, we find no error in the district Court's reasoning that the LPFA, at least for these purposes, is a state agency and enjoys immunity as a public agency from the allegations Benton charges.

897 F.2d at 199. Petitioner's requests for rehearing and rehearing *en banc* were denied on May 17, 1990.

REASONS FOR DENYING THE WRIT

I. The Enabling Legislation Governing the LPFA Meets the Standard Set In *Town of Hallie*, for a Finding of a "Clearly Articulated and Affirmatively Expressed" Policy to Displace Competition.

The Benton Firm invites this Court to grant *certiorari* to revisit the "clear articulation" element of state action immunity. Petitioner argues that this Court has not sufficiently defined the degree of "legislative specificity" necessary to prove a clear articulation of Louisiana's intent to displace competition. Petition at 22. According to Petitioner, the clear articulation standard should require the Louisiana Legislature solemnly to proclaim, "The LPFA may repeatedly choose the same law firm to serve as official bond counsel for each financing in which it participates." Petitioner is wrong.

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of financing did not state an antitrust cause of action. Indeed, the District Court distinguished those cases only because the LPFA is a borrower instead of a lender. The LPFA objected to this distinction on appeal to the United States Court of Appeals for the Fifth Circuit. Because of its decision to affirm the District Court's state action analysis, the Fifth Circuit did not address this issue.

The clear articulation standard has been fully and carefully explained by the decisions of this Court. Neither additional assistance from this Court nor the excruciating specificity suggested by Petitioner is required in order to satisfy the clear articulation requirement. The District Court correctly relied on this Court's decision in *Town of Hallie* when it held that "the state legislature clearly authorized the Authority to employ bond counsel in connection with the issuance of bonds and placed no restrictions upon the Authority in that connection, except that the attorney general must approve the fee." 897 F.2d at 204.

Petitioner misleads the Court by suggesting that there can be no satisfaction of the clear articulation standard because the Act "does not mention bond counsel or the manner of selection of bond counsel." Petition at 24. The Benton Firm ignores the importance of the Indenture as further indication of the state's policy. The Act requires that the LPFA's authority be set forth in an indenture of trust. § 9:2342. The LPFA's Indenture, approved by the state, makes special provision for the employment of bond counsel. Article 7.1(d)(iii). Thus, the state's policy regarding the employment of bond counsel could not be more explicit. *See First Am. Title Co. of South Dakota v. South Dakota Land Title Ass'n,* 714 F.2d 1439, 1454 (8th Cir. 1983), *cert. denied,* 464 U.S. 1042 (1984) (including agency rules and regulations within materials considered for finding the state's clearly articulated policy). The District Court's conclusion that Louisiana had clearly articulated its policy regarding the selection of counsel is both legally and factually supported.

In *Town of Hallie,* the Court squarely faced the issue of "how clearly a state policy must be articulated" for the purposes of *Parker* immunity. In that case, this Court held:

> As discussed above, the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. It is not necessary, as the Towns contend, for the state legislature to have

> stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects.
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> ***
>
> The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.
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> ***
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> Furthermore, requiring such explicit authorization by the State might have deleterious and unnecessary consequences . . . In fact, this Court has never required the degree of specificity that the Towns insist is necessary.[7]
>
> [7] Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statues. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Town of Hallie, 471 U.S. at 42-44. The LPFA need not show that the state compelled it to select particular bond counsel, or employ bond counsel in a particular way; nor must the LPFA show that the Louisiana Legislature expressly stated that it intended the LPFA to use its broad authority to hire bond counsel in an anticompetitive manner. *Town of Hallie,* 471 U.S. at 39-40.

In *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48 (1985), this Court reinforced its opinion in *Town of Hallie,* by rejecting the notion that a state must compel parties to engage in the challenged conduct. 471 U.S. at 62; *see also, Town of Hallie,* 471 U.S. at 46. This Court held that a state, to articulate sufficiently its policy, need only authorize the partic-

ular conduct, and by that authorization clearly intend to displace competition:

> The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

471 U.S. at 61.

The circuit courts of appeal have followed the lead set by this Court in *Town of Hallie* and *Southern Motor Carriers* to hold that a state's grant of the power to enter a contract or franchise is dispositive proof of a clearly articulated policy to displace competition. In *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985), for example, the power to enter contracts was sufficient to demonstrate the Texas Legislature's clearly articulated policy to displace competition. [9]

Other appellate decisions demonstrate the degree of specificity necessary to find a clear articulation of a policy to displace

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[9] *See also, Consolidated Tele. Cable Serv., Inc. v. City of Frankfort, Kentucky*, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, ___ U.S. ___ 109 S. Ct. 1537 (1989) (power to franchise); *Cine 42nd St. Theatre Corp. v. Nederlander Org.*, 790 F.2d 1032 (2d Cir. 1986) (power to lease); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987) (power to contract); *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985) (power to contract); *Springs Ambulance Serv. v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984) (power

competition. For example, a municipality with a right of first refusal to consent to competing construction acted pursuant to a clearly articulated policy to displace competition when it refused to consent to the construction of a competing water system. *Auton v. Dade City, Florida,* 1986-1 Trade Cas. ¶ 66,973 (11th Cir. 1986). A power to zone has been held to be a clearly articulated policy to displace competition. *Boone v. Redevelopment Agency of San Jose,* 841 F.2d 886 (9th Cir.), *cert. denied,* ____ U.S. ____, 109 S. Ct. 489 (1988). Indeed, a state bar with the authority to compel attorneys to obtain malpractice insurance and to fund the bar's malpractice pool, acts pursuant to a clearly articulated policy to displace competition when it compels all licensed attorneys to obtain primary malpractice coverage from the state bar. *Hass v. Oregon State Bar,* 883 F.2d 1453 (9th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S. Ct. 812 (1990).

There is no confusion among the lower courts requiring this Court to exercise its jurisdiction and expend its finite attention and resources to reconsider the parameters of the "clear articulation" standard. Indeed the circuit courts, consistent with the Fifth Circuit in this case, have had no trouble applying this Court's *Town of Hallie* opinion to evaluate the "clear articulation" standard. There is plainly no reason for this Court to grant the Benton Firm's petition for *certiorari* on this point.

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to contract). In addition, an appellate court has found clear articulation of state policy on behalf of a municipality with authority to regulate sanitation services but no express power to franchise. *L & H Sanitation, Inc. v. Lake City Sanitation,* 769 F.2d 517 (8th Cir. 1985).

II. The District Court Correctly Determined That the LPFA Need Not Show Active Supervision to Qualify for State Action Immunity.

The District Court found that the LPFA possessed the characteristics of a state agency and, thus, that active supervision of the LPFA's activities was not required to support a finding of *Parker* immunity under the *Midcal* standard.[10] Contrary to the Benton Firm's contentions, that finding is specifically supported by this Court's *Town of Hallie* decision.

In *Town of Hallie,* the Supreme Court acknowledged that the active supervision prong of the *Midcal* test did not comport with the responsibilities and powers of local governments to supply services for local populations. The Court held that the active supervision requirement:

> serves essentially an *evidentiary function:* it is *one way* of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. . . . Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Town of Hallie, 471 U.S. at 46-47 (emphasis supplied). This Court did not expressly limit the application of *Town of Hallie's*

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[10] The LPFA notes, however, that the record is replete with evidence of the degree of active supervision exercised by the State of Louisiana over the LPFA's activities, including the selection of bond counsel. Indeed, Petitioner concedes that the LPFA is actively supervised by the Louisiana legislature by asserting that a "proposed refunding was rejected by the State as serving no purpose other than the generation of bond counsel and other fees." Petition at 8.

rule to traditional municipalities. Instead, it acknowledged that there may be alternate, yet equally persuasive, evidence of compliance with a state's articulated policy sufficient to render the active supervision inquiry unnecessary for other types of non-private entities.

The Fifth Circuit in this case was not the first appellate court to apply the Court's *Town of Hallie* opinion outside of the pure municipality context. For example, the court in *Interface Group, Inc. v. Massachusetts Port Authority,* 816 F.2d 9, 13 (1st Cir. 1987), held, "Even if Massport is not the 'state' itself, it at least is *equivalent to* a municipality." (emphasis supplied.) The Eleventh Circuit had already come to the same conclusion with respect to an airport authority. *Commuter Transp. Sys. v. Hillsborough County Aviation Auth.,* 801 F.2d 1286, 1290 (11th Cir. 1986) ("Active state supervision is not a prerequisite to state action immunity for The Authority whether or not it is characterized as a "municipality." . . . The Authority is analogous to a municipality.").[11]

Most recently, the Seventh Circuit applied many of the decisions relied upon by the LPFA to find that the Rural Electric Convenience Cooperative ("RECC"), a private, non-profit energy cooperative need not be actively supervised to support its claim of state action immunity. In *Fuchs v. Rural Electric*

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[11] *See also Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Serv., Inc.,* 819 F.2d 910 (9th Cir. 1987), (a charitable corporation organized by one county and two cities was entitled to be treated as a municipality under the *Town of Hallie* standard); *Consolidated Tele. Cable Serv. v. City of Frankfort, Kentucky,* 857 F.2d 354 (6th Cir. 1988), *cert. denied,* ____ U.S. ____, 109 S. Ct. 1537 (1989) (cable franchisee was a "municipal agent" and therefore the court need not reach the supervision prong of *Midcal*); *Cine 42nd St. Theater Corp. v. Nederlander Org.,* 790 F.2d 1032, 1047 (2d Cir. 1986) ("The UDC, like a municipality, is by statute a political subdivision of the state. Therefore its interests must be defined as public rather than private, and consequently the active supervision requirement is unnecessary.")

Convenience Cooperative, 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 1744 (1989), the Seventh Circuit held:

> . . . when an entity charged with an antitrust violation is neither a municipality nor a state agency but does not have the attributes of a purely private actor, it may be held immune as a state actor without the active scrutiny of market conditions which is a necessary prerequisite for holding a private entity immune.

858 F.2d at 1217-18.

Petitioner relies on only one case, *Riverview Investments Inc., v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir.), *cert. denied*, ____ U.S. ____, 111 S. Ct. 151 (1990), to support its argument that *certiorari* should be granted as to the issue of whether the LPFA must show active supervision by the state. *Riverview Investments*, however, is not the mirror image either of this case or the cases on which the LPFA relies. In *Riverview Investments*, the bond issuing defendant, the CIC, was privately created. Its members were privately selected. The village had no say over the structure and operation of the CIC. The CIC had the exclusive right to amend its regulations without village approval. The village had no right to appoint members to the CIC, nor did it have any control over the CIC. The Sixth Circuit expressly noted these facts, which, in the court's opinion, distinguished *Riverview Investments* from *Consolidated Television*, *Ambulance Service of Reno*, and *Cine 42nd Street*. 899 F.2d at 479-481. See note 11, *supra*.

The LPFA, by contrast to the CIC, is a subordinate governmental unit of the State of Louisiana, empowered to act only for defined public purposes. 897 F.2d at 203; § 9:2341(B). The LPFA is run by public officials, who are appointed by the governor, subject to the oath of office, and removable for cause. § 9:2343. The LPFA is subject to the laws promulgated, and the Indenture of Trust accepted, by the State of Louisiana. §§ 9:2341

et seq. The LPFA is audited annually by the Louisiana State Auditor. § 9:2346. The LPFA's bonds must be approved by the state. § 9:2347. Hence, the LPFA cannot be compared to a purely private entity such as the CIC in *Riverview Investments.*

The evidentiary function imposed by the active supervision requirement is not necessary here, just as it was not in *Town of Hallie* and the other cases cited above, because the framework under which the LPFA was created and is administered provides ample security that private actors are not manipulating the laws for unlawful gain. The Fifth Circuit's decision in this case is consistent with this Court's precedent and the opinions of other appellate courts. There is no cause for this Court to grant *certiorari* to review the Fifth Circuit's affirmation of the District Court's conclusions.

III. A Conspiracy Exception to *Parker* Immunity is Fundamentally Inconsistent With the Rationale For the State Action Doctrine.

The pending appeal in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989), *cert. granted,* ___ U.S. ___, 110 S. Ct. 3211 (1990), has been brandished by Petitioner as a coattail to ride to review by this Court. In its *Omni* decision, however, the Fourth Circuit departed from established precedent and the underlying rationale of *Parker* immunity to create a "private conspiracy" exception. Thus, that decision is appropriately before this Court. Nevertheless, that appeal provides no independent reason for delaying the finality of Petitioner's case, much less a grant of *certiorari.* Petitioner's suggestion of a conflict among circuits that impacts the outcome of this case is but a mirage. Moreover, even were the *Omni* case comparable to this case,[12] there is no basis in this

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[12] The LPFA is puzzled by Petitioner's suggestion that this case is the "converse" of *Omni.* Petition at 14. The elements of "illegal bribery" or the state's operation in the allegedly affected market are not present

Court's precedent for creating a conspiracy exception to *Parker* immunity that would, in effect entirely eviscerate the state action doctrine.

Omni, and the principal cases on which the Fourth Circuit relied,[13] involved alleged private conspiracies regarding the enactment and enforcement of zoning ordinances. The distinction between those cases and this one is obvious. A zoning ordinance operates to alter free competition by precluding types of commercial activities in certain districts. The authority of a municipality to zone within its territorial jurisdiction does not, however, in any way contemplate or require that the municipality enter an agreement with a private party to enforce or enact a particular ordinance. In other words, the municipality is charged to consider all of its interested constituents and conduct its zoning plans with civic goals in mind.

Zoning ordinances are distinguishable from those aspects of government designed to provide services to populations. Transportation, sanitation, communications and public financing are just some of the commercial enterprises delegated to and regulated by agents of state or local government. The state actors in charge of these enterprises cannot always provide all elements and services incidental to their charge. Thus, state legislatures permit these state actors to award franchises and to contract for services. A state policy, such as in this case, which permits the state actor to enter contracts to obtain necessary services cannot be accomplished at all without an agreement with the service provider.

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here, just as they were not in *Omni*. The nine extra-record, allegations of impropriety identified in the Petition at 6-8 do not state examples of independently illegal activity.

[13] *Westborough Mall, Inc. v. City of Cape Girardeau, Missouri*, 693 F.2d 733 (8th Cir. 1982), *cert. denied, 461 U.S. 945 (1983); Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *reinstated*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Often, as in this case, such a contract necessarily excludes all others who may be willing or able to provide the same service to the state actor. A conspiracy exception applied to the LPFA's employment of bond counsel would essentially prevent the LPFA from obtaining bond counsel for LPFA bonds because the act of engaging counsel, itself, might trigger liability under Section 1 of the Sherman Act. Surely, this is not an appropriate result.

Although decided on the theory of a conspiracy exception, the *Omni* case is more appropriately considered as a case in which the Court was not persuaded of the state's clearly articulated policy to displace competition.[14] Indeed, the LPFA's analysis of *Omni* is supported by *Scott v. City of Sioux City, Iowa,* 736 F.2d 1207 (8th Cir. 1984), *cert. denied,* 471 U.S. 1003 (1985). In *Scott,* the Eighth Circuit revisited its *Westborough Mall* opinion, (on which the Fourth Circuit relied in *Omni*), stating:

> In that case, however, we did not have specific legislative authorization of the acts complained of and requisite legislative intent. We do not think Sioux City should be deprived of immunity simply because Weiner knew some of the council members and perhaps talked to them personally about factors important to the success of the downtown project. The purpose of state action immunity is to allow states and municipalities with state authorization to pursue health and welfare goals without threat of antitrust liability. That purpose would be frustrated in this case if the mere label "conspiracy" were enough to warrant an antitrust trial.

736 F.2d at 1215.

Similarly, the Tenth Circuit rejected a plaintiff's allegation of a "private conspiracy" regarding an urban renewal project in *Oberndorf v. City and County of Denver,* 900 F.2d 1434, 1439

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[14] In this respect, the *Omni* decision is in conflict with the Ninth Circuit's decision in *Boone,* in which the Court stated, "The power to zone and rezone, for example, by its very nature encompasses the power to exclude competition." 841 F.2d at 890.

(10th Cir.), *cert. denied,* ____ U.S. ____, 111 S. Ct. 129 (1990). The court observed that the allegations evidencing the private conspiracy were "not supported by sufficient evidence" and that the plaintiffs did not "show how these instances of misrepresentation relate to their claims that the urban renewal plan was not authorized by state law." The same observations may be made with respect to Petitioner's litany of alleged wrongdoing, none of which is supported by admissible evidence of record, and none of which goes to the issue of whether the LPFA is authorized to select bond counsel.

Petitioner also looks to *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), in support of its private conspiracy exception to *Parker* immunity. In that decision, however, the Court refused to find *Parker* immunity because the minimum fee schedules promulgated by the state bar were merely suggestive, and not compelled by the state. 421 U.S. at 789-791. Of course, in *Southern Motor Carriers,* the Court reconsidered and rejected the compulsion requirement. 471 U.S. at 61. More importantly, the Court found in *Goldfarb* that "far from exercising state power to authorize binding price fixing, [the state] explicitly directed lawyers not "to be controlled" by fee schedules. 421 U.S. at 789. The opinion in *Goldfarb* does not advance Petitioner's private conspiracy theory because, again, there was no clear articulation of a state policy to displace competition.

Petitioner's remaining support for a conspiracy exception to *Parker* immunity is equally unavailing. The decision in *Bolt v. Halifax Hospital Medical Center,* 891 F.2d 810 (11th Cir.), *cert. denied,* ____ U.S. ____, 110 S. Ct. 1960 (1990), raises the issue of whether *ultra vires* acts may be immunized as state action.[15] As in the case of *Westborough Mall,* the issue of *ultra vires* conduct is the flip-side of the clear articulation inquiry. Recently, a district court remarked, "the issue of whether the City has acted *ultra*

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[15] There is no allegation in the record that the Trustees of the LPFA have engaged in *ultra vires* activities.

vires will be decided by the same process as the determination of whether immunity should attach, the existence of proper state authorization. Plaintiff's argument is therefore tautological." *Paragould Cablevision, Inc. v. City of Paragould, Arkansas,* 739 F. Supp. 1314, 1319-20 (E.D. Ark. 1990). There is no logic to a private conspiracy exception to state action immunity for allegedly "*ultra vires*" conduct, because any such conduct would not meet the clear articulation standard.

The Petitioner also relies on *Bolt* because, in a footnote, that decision suggests that only unilateral action of the state may be exempt from the antitrust laws. The footnote from *Bolt* cited by Petitioner here, takes this Court's language in *Parker* grossly out of context. As this Court stated in *Parker:*

> But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state. . .
>
> . . . and we have no question of the state or its municipality becoming a participant in a private agreement . . .

317 U.S. 350-351. To lift this language in *Parker* out of context, and without consideration of this Court's subsequent clarification of the standards for state action immunity, is to disregard the meaning and purposes of the immunity in favor of mere verbal tricks. Indeed, this language in *Parker* presages the Court's articulation of the standard for state action immunity in *California Retail Liquor Dealers Ass'n v. Midcal,* 445 U.S. 97 (1980), as later refined for public actors in *Town of Hallie.* The essential inquiry is the state's expression of a policy that may displace competition.

This Court has recognized that "the reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act." *Hoover v. Ronwin,* 466 U.S. 558, 574 (1984). Here, the state granted the LPFA the power to select bond counsel. That expression necessarily implied that the LPFA

would be able to select from available counsel. This Court has never required a state to do more, has never questioned a state's motivation, before concluding that its policies are not subject to the antitrust laws.

In *Hoover,* the Court expressly recognized that the motivations of the state in enacting or enforcing its policies are irrelevant when assessing state action immunity.[16] 466 U.S. at 579-80. The Court continued,

> The reasoning adopted by the dissent would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on *perceived conspiracies* to restrain trade among the committees, commissions, or *others* who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine.

466 U.S. at 580 (emphasis added.)

The Court's rationale in *Hoover* applies with equal force to the case here of a state agency acting pursuant to the state's clearly articulated policy. In order to conclude otherwise, Petitioner disregards this Court's decision in *Community Communications Co. v. City of Boulder, Colorado,* 456 U.S. 1001 (1981), which is contrary to any limitation of the state action doctrine to unilateral acts of the state. The Court did not reject state action immunity for the City of Boulder because it would not be permissible to award exclusive franchises anticompetitively. Rather, the Court rejected the city's claim of immunity because the state had not clearly articulated a policy to displace competition regarding cable services at the local level. In this case, the state has authorized the LPFA to employ counsel pursuant to a clearly articulated policy to displace competition. That must be the end of the inquiry.

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[16] In *Boone,* 841 F.2d at 891, the court rejected a private conspiracy exception to state action immunity, recognizing that the "ordinary abuses" and "imperfect exercise" of state power are best left to the state tribunals. *See also, Town of Hallie,* 471 U.S. at 44.

In light of the precedents of this Court, the Fourth Circuit departed from established law when it held that a municipality can be liable for an antitrust violation, despite the fact "that *Town of Hallie*'s requirements are satisfied." *Omni*, 891 F.2d at 1132. To proceed with further antitrust analysis after that conclusion is to examine the motivations of state actors and the appropriateness of state policy. This Court has repeatedly rejected that step.[17] For this Court to grant *certiorari* in this case on the issue of a conspiracy exception to state action immunity would invite the reexamination of every action by a municipality or state agency, regardless of whether authorized by the state legislature, to confirm the purity of the actor's motivations. In *Parker*, and again in *Hoover*, and yet again in *Town of Hallie*, this Court has declined to permit federal courts to review the motivations of state actors and the wisdom of state policies that replace competition with regulation. This Court should decline again to entertain this type of review.[18]

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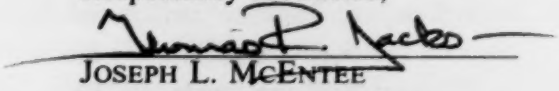
[17] If the only allegation is that the act is anticompetitive, and the *Town of Hallie* standard has been satisfied, this Court's precedent dictates only that there is not an antitrust violation. In an appropriate case, however, a party with a grievance involving both public and private actors has redress through both the state political process and the relevant state laws, if for example, bribery or other wrongdoing has taken place.

[18] The suggestion that the District Court failed to address the Benton firm's § 2 claim is incorrect. The District Court's opinion recognized and encompassed both Petitioner's § 1 and § 2 causes of action under the Sherman Act. 897 F.2d at 202. After it had analyzed the nature of Petitioner's causes of action and the applicability of the state action doctrine, the District Court concluded, "under these circumstances, it is not necessary to pass upon the other issues in this case." 897 F.2d at 204. Pursuant to Louisiana's clearly articulated policy to displace competition, the LPFA's selection of bond counsel is an immune activity. The market that the law firm Respondents are alleged to have attempted to control, the market for service as LPFA's bond counsel, cannot exist absent the LPFA's exercise of its immune power to

CONCLUSION

Petitioner has failed to demonstrate any basis for this Court to grant a *writ of certiorari*. The courts below properly analyzed the facts and applied this Court's prior decisions to conclude that the state action doctrine bars Petitioner's antitrust causes of action. Petitioner, despite resorting to improper extra-record citations, can articulate no basis to review further those decisions. The request for a writ should be denied.

Respectfully submitted,



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select counsel. In these circumstances, the monopolization count depends upon the conspiracy count; there cannot be one without the other. If the LPFA's selection of counsel is immune, the selected counsel, who could monopolize the market for LPFA bond counsel only by their selection, must also be within the ambit of state action immunity. The Court's finding of state action immunity bars both the § 1 and § 2 claims.

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 1990, three true and correct copies of the foregoing Brief of Respondent Louisiana Public Facilities Authority were served by United States mail, postage prepaid, to:

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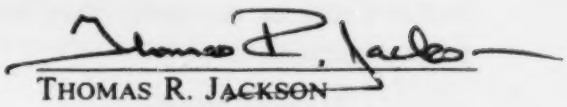

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(3)

No. 90-582

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CLERK

In The

Supreme Court of the United States

October Term, 1990

BENTON, BENTON & BENTON,
A Professional Law Corporation,

Petitioner,

v.

LOUISIANA PUBLIC FACILITIES AUTHORITY, STEVE E. HICKS, FOLEY, JUDELL, BECK, BEWLEY, MARTIN & HICKS, and McCOLLISTER, McCLEARY, FAZIO & HOLLIDAY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS FOLEY, JUDELL, BECK, BEWLEY, MARTIN & HICKS, STEVE E. HICKS AND McCOLLISTER, McCLEARY, FAZIO & HOLLIDAY IN OPPOSITION

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Respondents Foley, Judell, Beck, Bewley, Martin & Hicks, Steve E. Hicks and McCollister, McCleary, Fazio & Holliday oppose the Petition for Writ of Certiorari filed by Benton, Benton & Benton for the reasons set forth in the Brief of Respondent Louisiana Public Facilities Authority in Opposition. Rather than be duplicative, said Respondents hereby adopt in full the arguments made in the Brief of the Louisiana Public Facilities Authority as their own and respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(4)

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BENTON, BENTON & BENTON,
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LOUISIANA PUBLIC FACILITIES AUTHORITY, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF OF RESPONDENT LOUISIANA PUBLIC FACILITIES AUTHORITY IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Reply to Brief of Respondent Louisiana Public Facilities Authority in Opposition 1

I. The Public Trust Act Does Not Immunize Respondents' Conduct from the Antitrust Laws 1

II. The LPFA is the Type of Entity Properly Subject to the "Active Supervision" Requirement to Qualify for State Action Immunity 5

III. A Conspiracy Exception to *Parker* Immunity Prevents Misuse of the State Action Doctrine to Shield Private Anticompetitive Activity 7

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Cantor v. Detroit Edison Company, 428 U.S. 579, 96 S.Ct. 3110 (1976) 4

Community Communications Company v. City of Boulder, 455 U.S. 40, 102 S.Ct. 835 (1982) 4

First American Title Company of South Dakota v. South Dakota Land Title Association, 714 F.2d 1439 (8th Cir. 1983), cert. denied 464 U.S. 1042, 104 S.Ct. 709 (1984) 3

Halifax Hospital Medical Center v. Bolt, 891 F.2d 810 (11 Cir. 1990), cert. denied ___ U.S. ___, 110 S.Ct. 1960 (1990) 8

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307 (1943)... 1, 4, 9

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48; 105 S.Ct. 1721 (1985) ...1, 4

Town of Hallie v. City of Eau Claire, 471 U.S. 34; 105 S.Ct. 1713 (1985) 2, 4, 5

STATUTES

La. R.S. 12:202.1 6

La. R.S. 14:136 6

La. R.S. 35:1 6

La. R.S. 39:231 7

La. R.S. 39:1405(B) 6

La. R.S. 42:1116 10

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

Louisiana Constitution Art. 3, § 15(B). 3

FEDERAL RULE

Supreme Court Rule 15.6. 1

REPLY TO BRIEF OF RESPONDENT LOUISIANA PUBLIC FACILITIES AUTHORITY IN OPPOSITION

Pursuant to Rule 15.6, petitioner, Benton, Benton & Benton, files this reply to address arguments raised in the brief in opposition submitted by respondent Louisiana Public Facilities Authority ("LPFA").[1]

I. The Public Trust Act Does Not Immunize Respondents' Conduct from the Antitrust Laws.

The question of state action immunity hinges on whether the challenged conduct is that of "a state or its officers or agents [engaging in] activities *directed by its legislature*." *Parker v. Brown*, 317 U.S. 341, 350; 63 S.Ct. 307, 313 (1943) (emphasis added). In order to be immune, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' " *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48; 105 S.Ct. 1721 (1985). In the instant case, that test simply has not been met.

The respondents cannot point to a single word in Louisiana's Public Trust Act, La. R.S. 9:2341-9:2347 (Petition

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[1] In addition, this reply addresses certain statements of fact that require correction or clarification. Respondent LPFA begins its brief in opposition by suggesting, inaccurately, that petitioner failed to diligently pursue discovery prior to respondents' motions for summary judgment and, therefore, failed to make a record to substantiate its claims. In fact, respondents resisted petitioner's requests for production of documents and petitioner elected to conduct extensive preparation with the assistance of its antitrust experts, including economist Dr. William Moore, Ph.D., through examination of public records in the possession of the Louisiana Bond Commission, the Louisiana Attorney General and the Louisiana Secretary of State, as well as interrogation of third parties having information relevant to petitioner's claims. See Record, pp. 246-279 and pp. 323-336. This extensive evidence, including without limitation, the affidavit of Dr. Moore, appears in the record of this matter. Since this case is before the Court on motion for summary judgment, the evidence must be viewed in the light most favorable to petitioner.

Appendix, pp. 15a-32a), that mentions bond counsel or the manner of selection of bond counsel, or intimates that the legislature "contemplated" the LPFA's anticompetitive activity or suggests that such anticompetitive activity would "foreseeably result" from any other authorized or mentioned activity. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43-44; 105 S.Ct. 1731, 1718-19 (1985). The act is a general statute that authorizes the creation of so-called "public trusts" generally. It does not establish or create the LPFA. The act does not even mention the LPFA.

Respondents attempt to sidestep this fact by obfuscating the state action issues raised by petitioner in this case. First, they argue that immunity does not require specific legislative authorization for the challenged restraint:

> "According to Petitioner, the clear articulation standard should require the Louisiana Legislature solemnly to proclaim, 'The LPFA may repeatedly choose the same law firm to serve as official bond counsel for each financing in which it participates.' Petitioner is wrong." (Brief in Opposition, p. 9)

This argument knocks down a straw man. Petitioner does not argue that such specificity is required. There is not even a *single* sentence from the legislature allowing the LPFA to name bond counsel, or intimating that the legislature "contemplated" anticompetitive activity in such selection, or suggesting that such anticompetitive activity would "foreseeably result" from some articulated authority or power granted the LPFA.

Total silence cannot afford immunity. It is clear that the Louisiana legislature never even imagined that the LPFA would displace competition in the naming of bond counsel.

For precisely this reason the LPFA strains to find a grant of immunity in its indenture of trust prepared by respondent Steve Hicks to create the LPFA in 1974. See Petition, p. 3. The LPFA begins by erroneously suggesting to the Court that the LPFA's indenture has been approved or adopted by the legislature and is presumably thus akin to a statute.[2]

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[2] At p. 5 of their opposition, respondents refer to the present provisions of the Public Trust Act and imply that the LPFA's indenture

(Continued on following page)

Act No. 778 of 1978, merely ratified the governor's acceptance of the "beneficial interest" in "public trusts" generally. Indeed, this legislation does not even mention the indenture or the LPFA, stating simply:

> "The acceptance of the *beneficial interest* by the *Governor* in any public trust which designates as its beneficiary the State of Louisiana or any state agency and which was created prior to September 30, 1974 under the provisions of Act 135 of the 1970 Regular Session of the Louisiana legislature is hereby ratified and confirmed." (emphasis)

Clearly, the legislature did not "enact" the indenture into law.[3]

Respondents next suggest that the indenture, if not a statute, is akin to a regulation promulgated pursuant to a statute. This argument, too, is without merit. The Public Trust Act does not delegate any rule-making or regulatory authority to public trusts. This case is fundamentally unlike *First American Title Company of South Dakota v. South Dakota Land Title Association*, 714 F.2d 1439 (8th Cir. 1983), cert. denied 464 U.S. 1042, 104 S.Ct. 709 (1984) on which respondents rely. That case involved a real regulation by a body to which the power to regulate had been expressly delegated by statute.

Next, respondents declare that acceptance of the beneficial interest in the LPFA "by the state" means that the

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(Continued from previous page)

was approved by the Legislature. This implication is erroneous. At the time the LPFA was formed in 1974, the requirement of legislative acceptance of the "beneficial interest" was not contained in the law. See Act No. 135 of 1970. The requirement of legislative acceptance of the "beneficial interest" was not added to the law until Act No. 699 of 1976. Louisiana's legislature has never received, seen or considered the LPFA's indenture and has never been apprised of its contents. To suggest that the indenture, unexamined by the legislature, constitutes legislative expression of an intent to displace competition for bond counsel services is pure fiction.

[3] In addition, Louisiana Constitution Art. 3, §15(B) prohibits legislative enactment by reference.

indenture somehow became the explicit articulation of state policy regarding the employment of bond counsel. This argument is even more attenuated. The indenture was not issued or enacted by the legislature but drafted by respondents. Therein lies the ultimate flaw in respondents' reliance on the indenture. A state can immunize individuals and entities from antitrust liability *through legislation* containing a "clearly articulated and affirmatively expressed" policy to displace competition with regulation. A state may not, however, authorize persons to fashion their own immunity – as respondents are, in essence, attempting to do here. As stated in *Parker v. Brown*, supra, 317 U.S. at 351, 63 S.Ct. at 314:

> "A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful."[4]

In short, respondents cannot be immunized by legislative silence on the subject in question or by an instrument of their own device. This Court has never so held, and to do so now would expand the state action doctrine to the point of enveloping the Sherman Act itself.

Finally, respondents argue that the instant case presents no novel issue for consideration by this Court because it is consistent with this Court's decisions on the "clear articulation" issue contained in *Town of Hallie*, supra, and *Southern Motor Carriers Rate Conference, Inc.*, supra, as well as other decisions. A review of the cases cited in respondents' brief in opposition demonstrates that in none of these cases did the

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[4] See *Cantor v. Detroit Edison Company*, 428 U.S. 579, 96 S.Ct. 3110 (1976), rejecting a power company's claim that its own tariff could afford it immunity for illegally tying sales of light bulbs to electrical service, even though the tariff had been approved by the Michigan Public Services Commission. Respondents, like Detroit Edison, are attempting to bootstrap their own immunity.

See, also, *Community Communications Company v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835 (1982), in which this Court rejected Boulder's claim that its own ordinances immunized it because Colorado law gave it a general power to enact ordinances.

court find "clear articulation" outside the context of legislative pronouncement. This case presents this Court with the novel question of whether the "clear articulation" standard can be met by language contained in an instrument such as the indenture, and not in a statute.

II. The LPFA is the Type of Entity Properly Subject to the "Active Supervision" Requirement to Qualify for State Action Immunity.

Respondents next argue that the LPFA is akin to a state agency or analogous to a municipality so that the "active supervision" requirement for conferring immunity on private parties does not apply to the LPFA. Alternatively respondents appear to argue that the LPFA is subject to sufficient "active supervision" so as to meet such requirement. According to respondents:

> "The evidentiary function imposed by the active supervision requirement is not necessary here, just as it was not in the *Town of Hallie* and the other cases cited above, because the framework under which the LPFA was created and is administered provides ample security that private actors are not manipulating the laws for unlawful gain." Brief in Opposition, p. 17.

The LPFA's susceptibility to manipulation by respondents for private commercial gain, rather than its status as a public or private entity, should be determinative of whether the "active supervision" requirement is needed for purposes of antitrust immunity. As noted in the original petition, the characterization of an entity as public or private has not proved particularly fruitful in determining whether the active supervision requirement is necessary to ensure compliance by such entity with articulated state policy.

In any event, regardless of whether the LPFA is characterized as a public or private entity, its indenture, which is characterized as a "contract with the state" (La. R.S. 9:2342(A)), expressly stipulates that the state shall have no control over the LPFA's operations. Petition, pp. 3-4. The LPFA urges, in matters that serve its purposes, that it has

complete independence from the state and from any control or supervision by the state.

None of the other legal requirements imposed by statutes on public trusts constitute the LPFA a governmental entity or subject it to active state supervision for purposes of the antitrust laws. Contrary to respondents' assertions, appointment by the governor, taking the oath of office required of public officials and subjection to *some* of the criminal statutes applicable to state officials do not make the trustees " 'public officers' within the executive branch of the Louisiana state government." Brief in Opposition, p. 4. Notaries public in Louisiana (including practically all attorneys in the state) are appointed by the governor, confirmed by the Senate and take an oath of office (La. R.S. 35:1), and though they perform public functions, they are not considered state officials within the traditional meaning of that term. While some criminal statutes applicable to public officers also apply to the LPFA's trustees under the Public Trust Act, others, such as malfeasance in office (La. R.S. 14:136), do not. In addition to the LPFA, certain nonprofit corporations, which also are not governmental entities, are subject to the requirements and provisions of the public contract law, the public meetings law and the public records laws of the state (La. R.S. 12:202.1), and they are not, simply by virtue of being subject to such laws, therefore governmental entities. Additionally, the Louisiana State Bond Commission is required by law to approve the issuance of all bonds exempt from taxation under federal law, regardless of whether such bonds are issued by a public or *private* entity (La. R.S. 39:1405(B)). And, finally, though subject to audit by the Louisiana legislative auditor under the Public Trust Act, the LPFA is not treated like a governmental entity. Its funds are not subject to state control or appropriation and its trustees and employees are not required to conform to the restrictions applicable to government officials. The LPFA's employees are not members of the state civil service and subject to its restrictions. Additionally, the LPFA's trustees and employees are not subject to the regulations and restrictions on travel, meals, lodging and entertainment applicable to all state officials and employees. See La.

R.S. 39:231. Indeed, in defending the lavish expenditures of the trustees and employees of the LPFA with LPFA funds, Chairman Victor Bussie characterized the LPFA as "to some extent a private enterprise". Record, pp. 290-292. The LPFA has not acted nor been treated as a governmental entity for any purposes and has not been subject to any meaningful supervision to ensure that its practices comport with articulated state policy in any respect.

The maintenance of an LPFA bond counsel monopoly is not supervised under any state laws by any state authority or board. Contrary to respondents' suggestion, "infrequent" exercise of powers by the state is not the problem. See Brief in Opposition, p. 5 at note 4. The absolute lack of state power to supervise is the problem.

III. A Conspiracy Exception to *Parker* Immunity Prevents Misuse of the State Action Doctrine to Shield Private Anticompetitive Activity.

Respondents urge the Court to reject a conspiracy exception to *Parker* immunity on the grounds that (i) such exception might trigger antitrust liability whenever a government entity enters into a contract or agreement with a service provider, (ii) such exception is unnecessary, because it is tantamount to a finding of no clear articulation of state policy to displace competition, and (iii) such exception will require federal courts to review the subjective motivation of state actors and the wisdom of state policies.

The assertion that recognition of a conspiracy exception to the *Parker* doctrine will subject every agreement between a governmental entity and a service provider to antitrust scrutiny is, at best, disingenuous. Respondents would have the Court view the provision of bond counsel services as identical to the provision of transportation, sanitation and communication services, which, arguably, might be more efficiently and effectively provided in the public interest by means of exclusive franchises with obvious and predictable anticompetitive effects. The provision of bond counsel services simply does not fit such characterization. Indeed respondents argue elsewhere in their Brief in Opposition that the LPFA "selects its

bond counsel on a transaction-by-transaction basis". See Brief in Opposition, p. 6.

If this were, in fact, the case, then the LPFA would not legitimately fear that each agreement it enters into could trigger potential antitrust liability. Indeed, petitioner does not complain of individual agreements on a transaction-by-transaction basis. Petitioner complains, and the record and admissions of respondents reflect, that LPFA officials have entered into an overarching agreement with Hicks-related firms to contract for their services on each and every transaction undertaken by the LPFA, and it is this agreement that falls outside the scope of antitrust immunity and requires application of a conspiracy exception to the *Parker* doctrine. Respondent Foley, Judell, Beck, Bewley, Martin & Hicks admitted in its "Statement of Material Facts as to Which There is no Genuine Dispute":

> "9. From its inception in 1974, the LPFA has usually selected as bond counsel Steve Hicks and/or the law firm with which he was associated, including the Foley Firm and the McCollister Firm. The LPFA has not selected the Benton Firm as bond counsel on any LPFA transaction to date." Record, p. 131.

Respondents' second contention is that there is no logic to a private conspiracy exception to state action immunity for allegedly "ultra vires" conduct, because such conduct would not meet the clear articulation standard anyway. This argument reflects an extremely superficial analysis of the problem sought to be curbed by recognizing the conspiracy exception for ultra vires acts. As recognized by the 11th Circuit in *Halifax Hospital Medical Center v. Bolt*, 891 F.2d 810 (11 Cir. 1990), cert. denied ___ U.S. ___, 110 S.Ct. 1960 (1990), even in situations where there is a clearly articulated state policy to displace competition, unauthorized and unforeseeable activities undertaken pursuant to a private conspiracy rather than the articulated anticompetitive state policy do not deserve exemption from antitrust scrutiny. Like Dr. Bolt, petitioner in the instant case alleges ultra vires acts by respondents, undertaken pursuant to a private conspiracy rather than in furtherance of any articulated state policy.

Contrary to respondents' suggestion that there is no allegation that the LPFA and other respondents have engaged in ultra vires activities, petitioner has specifically alleged and presented evidence of such activity. Even assuming, *arguendo*, an articulated state policy to displace competition in the selection of bond counsel, surely such actions as coercing project developers to purchase real estate owned by bond attorneys in connection with LPFA bond issues, threatening to deny needed tax-exempt bonding capacity to one of petitioner's municipal clients unless petitioner dropped the present antitrust action, and intimating the possibility of labor unrest in connection with the construction projects of an LPFA project beneficiary, a hospital, which balked at the engagement of a Hicks-related firm as bond counsel, constitute exactly the sort of ultra vires acts that emanate from a private conspiracy subject to the antitrust laws, rather than the legitimate fulfillment of an articulated state policy to displace competition. See Petition, pp. 5-9.

Respondents' final argument opposing this Court's recognition of a conspiracy exception to *Parker* immunity asserts that recognition of such exception will require federal courts to review the subjective motivations of state actors and the wisdom of state policies, inquiries which this Court and subordinate federal courts have historically declined to undertake.

Petitioner has extensively addressed this concern in its original petition for certiorari. In addition, petitioner's "litany of alleged wrongdoing", criticized by respondents as being devoid of antitrust significance (Petition, pp. 6-8; Brief in Opposition, pp. 8, 20), contains glaring evidence of conspiracy for private gain without necessitating any inquiry into the subjective motivations of state actors and the wisdom of state policies. The unique and highly profitable treatment afforded respondent attorneys by the LPFA presents prima facie evidence of improper conspiracy to benefit these attorneys at the expense of their competitors and the public in general. The elements of coercion and abuse of office evidenced by certain

actions of LPFA officials and described in petitioner's "litany" are not worthy of *immunity* from the antitrust laws.[5] Clearly, the instant case amply demonstrates that the LPFA has been captured by and is controlled for the benefit of respondent private attorneys and the recognition of a conspiracy exception does not necessitate examination of subjective motives of government officials or the wisdom of state policies, but can instead be predicated on the same type of evidence and analyzed in the same fashion as any other alleged violation of the antitrust laws. See Petition, pp. 19-22.

CONCLUSION

For the foregoing reasons, as well as the reasons originally urged by petitioner, it is respectfully submitted that this Court should grant petitioner's application for writ of certiorari.

Respectfully submitted,

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[5] See La. R.S. 42:1116 and paragraphs nos. 6 and 8 of Petition, pp. 7-8.